87 1896

COPY

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

QUESTIONS PRESENTED

1. Whether Section 6083(c) of the California Business and Professions Code ("B&P Code") is facially unconstitutional as violative of the due process (14th Amendment), when highest court of State (acting as de novo tribunal[1]) is required by that statute to shift the burden of proof of his innocence to Appellant (accused, licensed lawyer), in contravention of the rulings of Sandstrom vs. Montana (1979) 442 U.S. 510 and Connecticut vs. Johnson (1983) 460 U.S. 73.

2. Whether Section 6049.1, B&P Code was unconstitutionally applied by Appellee (approved by California Supreme Court) by prejudicially admitting into evidence, in quasi-criminal disciplinary proceedings, totally extraneous hearsay "findings, conclusions, orders or judgments" of tribunals

---

[1]Worth vs. State Bar (1978) 22 C.3d 707, 150 Cal.Rptr. 273

other than those "authorized by law to conduct disciplinary proceedings against attorneys", and other than those made "in any disciplinary proceeding against the same person" (Appellant), such "misapplication" is denial of Appellant's **14th Amendment** due process rights, and **6th Amendment** confrontation and cross-examination rights.

3. Whether **B&P Code Section 6049.2** was unconstitutionally applied where the application authorizes admission into evidence (in disciplinary proceedings conducted by Appellee) of "duly authenticated transcripts of testimony of witnesses", in lieu of the actual live testimony of such witnesses before the Appellee: (Emphasis added)

> (a) Where the testimony of such witnesses (in transcript form from other proceedings) was given under

circumstances in which Appellant did not have a reasonable or adequate opportunity for cross examination of such witnesses in such other proceedings;

(b) Where the "transcript testimony" of such witnesses, from such "other proceedings", although prejudicial to Appellant, was not relevant or material to the issues before Appellee's Hearing Committee; or

(c) Where, instead of confining the portion of "transcripts from other proceedings" to the "relevant testimony of witnesses in the other proceedings" i.e. relevant to the issues before the Appellee's (Hearing) Committee, there was admitted in the Appellee's disciplinary proceedings (over objection) the entire of the Reporter's transcripts (from such other proceedings), which, in addition to

"testimony of witnesses relevant to State Bar disciplinary issues", the admitted transcripts contained the hearsay conclusions, opinions, statements of Court(s), and utterances of others, arguments of counsel, all of which were prejudicial to Appellant, (Emphasis added)

did any of such three "applications" or "uses" of that statute, constitute federally unconstitutional application, in deprivation of Appellant's rights of confrontation, of notice and hearing, of cross examination, and of due process, under the **6th, 8th, and 14th Amendments**?

4. Whether Appellant's due process rights under the **14th Amendment**, are violated by the introduction of evidence concerning "uncharged" offenses, and by Appellee's finding (Findings of Fact, No. 38 on p. 15,

contained in "DECISION" (Appendix No. 1), i.e. Appellee's recommendation accepted by California Supreme Court, of guilt or culpability of such uncharged offenses, where accused Appellant was adjudged guilty and ordered disbarred (recommendation by Appellee, administrative arm of, accepted by, California Supreme Court) because of offenses, which Appellee concedes and admits are "not specified" in the Dec. 6, 1972 Notice to Show Cause (Appendix No. 2), California equivalent of statement of charges or accusations, so that Appellant had no advance notice or opportunity whatever to prepare or present a defense.

5. Whether where Appellant's disbarment recommended by Appellee, administrative body, adopted and ordered by the California Supreme Court <u>where no (competent or lawful) evidence whatsoever</u> was utilized to support the recommendation "DECISION" that Appellant be

disbarred constitutes a violation of Appellant's rights to due process under the **14th Amendment**.

6. Whether administrative body's (Appellee's) use of a "clear and convincing evidence" standard, utilized in quasi-criminal proceeding (for disbarment of accused attorney, such as Appellant) instead of the **Winship** standard, (i.e. beyond reasonable doubt) deprived Appellant of his **14th Amendment** due process rights, where administrative body's recommendation of disbarment was adopted in final decision (Feb. 18, 1988) of State's highest court. (Appendix 3)

7. Whether the administrative arm of the California Supreme Court, i.e. State Bar, Appellee herein, by refusing Appellant's request to disqualify the biased, prejudiced (against Appellant) the evidence-taking

authors of findings (Appellee's "Committee") violates Appellant's **14th Amendment**, as enunciated in **In Re Murchison**, where such Committee was in fact so biased and prejudiced, and where its recommendation was unanimously adopted by the California Supreme Court (disbarring Appellant) in its Order of July 13, 1987, (Appendix 4) rehearing denied by the Supreme Court Feb. 18, 1988 (Appendix 3) as Final Judgment.

8. Whether Appellee and the Supreme Court of California (or either of them) in denying Appellant of opportunity (repeatedly promised to Appellant) to present documentary and testimonial evidence in his defense, is deprivation of Appellant's rights to due process and fair hearing (**14th Amendment**), where Appellant, in reliance on such repeated promises throughout the entire hearing period (about nine years), refrained from presenting evidence in his defense, and was finally

denied and refused such opportunity by the abrogation and repudiation of the promises by the tainted Hearing Committee of Appellee.

9. Whether intentional delay by Appellee (of entire 18, 10 or 7 years), in the conduct of the quasi-criminal disciplinary proceedings, resulting in prejudice to Appellant, violates his speedy trial, due process rights, under the **14th Amendment**, or his guaranty against cruel and unusual punishment, under the **Eighth Amendment**.

10. Whether Appellee's (and ultimately California Supreme Court's) reliance upon vital information, to which Appellant was denied any access, which information was "shared" by administrative (Hearing) Committee of Appellee and by Trial Examiner (Prosecutor) representing Appellee, where ultimate judgment of disbarment in part is based upon such vital "secret (as to Appellant) information" is

constitutionally impermissible, violating Appellant's right to notice of charges or accusations under the **6th Amendment** "Notice" and **14th Amendment** due process principles.

11. Whether in quasi-criminal disciplinary proceedings, Appellant was deprived of **6th and 14th Amendment** rights to compulsory process to obtain witnesses in his favor, where administrative arm (Appellee) of California Supreme Court first issued, and then cancelled (without cause) and refused to enforce its own subpoena duces tecum issued at request of Appellant, for witnesses and writings necessary to Appellant's defense.

12. Whether Appellee's Review Department deprived Appellant of **14th Amendment** due process fair hearing and equal protection rights where:

(a) Appellant was denied "evidentiary

hearing" in Review Department after its misrepresentation that "hearings" would be accorded Appellant, who detrimentally relied on the misrepresentation;

(b) Where Review Department, contrary to procedure required of, and regularly utilized by it in other cases, failed and refused to independently review the record in Appellant's case;

(c) Where Review Department acted in violation of "en banc" hearing (mandatory requirement), on which Appellant justifiably relied;

(d) Where "sham" hearing was conducted by Review Department, in that time allocated was ten minutes to review hundreds of thousands of pages to be reviewed, while in other cases, five minutes was accorded in which only hundreds of pages (or less)

of record were to be reviewed.

13. Whether Appellant's rights to fair hearing, equal protection, and due process (**14th Amendment**) are violated where consistent policy of California Supreme Court to accord great weight to "recommendations of Appellee (Hearing Panel)" because Hearing Panel had opportunity to observe demeanor and conduct of witnesses appearing before it,[2] and where same rule was applied to case of Appellant, where in fact there were no Appellee witnesses who appeared before Hearing Panel.[3]

14. Whether the fact that two justices out of

---

[2]**Spindell vs. State Bar** (1975) 13 C.3d 253, 118 Cal.Rptr. 480.

[3]In fact there were three casual witnesses, none dealing with culpability or issue or wrongdoing, called by Appellee; the entire remainder of the record (except witnesses called by Appellant, whose testimony, favorable to Appellant, was totally uncontradicted, but ignored by Appellee and by California Supreme Court) consisted of documentary evidence and other writings.

seven comprising California Supreme Court, were appointed on the eve of its hearing, with consequent physical impossibility for those two justices to have meaningfully "reviewed" the "entire record" and "all of the evidence" (because there was not possibly enough time for the two to have read the record and evidence) so as to enable Supreme Court's independent review of all evidence and record, deprived Appellant of fair hearing, due process, and equal protection rights, all under the **14th Amendment**, where California Supreme Court expressly stated that its Opinion was "unanimous" and that that Court "must independently examine the evidence."

15. Whether prosecutorial misconduct by Appellee's "Trial Examiner" (flat misrepresentations of highly prejudicial and material facts and concealment of truth) constitutes deprivation of fair trial and due process rights guaranteed by the **14th**

Amendment, where Committee's disbarment recommendation was based upon the falsity, and where State Supreme Court "adopted" unanimously.

16. Whether state's allotting to accuser (administrative arm of California Supreme Court, i.e. Appellee's Prosecutor-Examiner) over one-and one-half years (including extensions) for preparation of Opening Brief, and confining Appellant's allotted time to four months, without explanation, constitutes deprivation of Appellant's due process, equal protection, and fair hearing rights under the **14th Amendment**, especially where Appellant (due to such discriminatory action by Appellee) was prevented from filing any brief whatsoever.

17. Where evidence before Appellee (Committee) was uncontradicted that at underlying civil proceeding, Appellant and his

counsel did not have adequate or reasonable opportunity to cross examine witnesses, and where the testimony of such witnesses (from the civil proceedings) was admitted by Committee in evidence in transcript form in State Bar proceedings, over objection of Appellant, constitutes clear deprivation of due process and fair trial rights under the **14th Amendment**, and rights of confrontation and cross examination under the **Sixth Amendment**.

18. Where a statement made in argument by Appellant in his Petition for Review (to California Supreme Court) that Appellant was (**inter alia**) "caught in the system" was treated deceptively (by California Supreme Court's misleading excerpting out of context) as an admission of guilt by the California Supreme Court, whether such State action (reversing the opposite plain meaning of contended innocence to "admitted guilt")

violated Appellant's fair trial and due process rights under the **14th Amendment**.

19. Whether deliberate misconstruction (by California Supreme Court) of record, so as to erroneously pretend, mistake, and misrepresent facts concerning alleged "refusal to turn over clients' files", and "blameworthiness" for institution of bankruptcy petition, where the opposite is true, is denial of Petitioner's right to a meaningful and fair due process review (or hearing) in Court of Last Resort, under **14th Amendment**.

20. Whether action of the California Supreme Court, and of its administrative arm (Appellee) in considering as "evidence" (over Appellant's objection) the hearsay statements and opinions in "Certificates of Review" of a referee in bankruptcy (purportedly supporting offenses warranting disbarment), violates Appellant's due process, fair hearing and

equal protection rights under the 6th and 14th Amendment, where Appellant was deprived by such action of rights of confrontation and cross-examination.

21. Whether the total years of pendency (from filing of complaint to termination) of proceedings, quasi-criminal in nature, or whether component portion of 18 years consisting of approximately 4 years of delay in informing Appellant of charges against him, or whether delay of 10 years in the conduct of the actual hearings which delay was unilaterally attributable to actions of Appellee, and where, in such circumstances, Appellant's livelihood and license were taken from him, notwithstanding that Appellant had no record of any discipline in one-half century of practice, whether the combination of the delay and the harshness of the final penalty (disbarment) constituted cruel and unusual punishment in violation of Appellant's

rights under the **8th and 14th Amendments**.

22. Whether Appellee's failure to notify Appellant of the fact and nature of charges pending against him for 3 to 4 years following filing of complaint violated Appellant's rights to be informed as to charges pending against him as guaranteed by the **6th Amendment**, and to due process, fair hearing under the **14th Amendment** where Appellant was deprived of opportunity to introduce evidence and cross-examine witnesses in related civil cases because of such delay, and where parts of records and hearsay conclusions in such civil cases formed the basis for Appellee's and California Supreme Court's determination of Appellant's guilt in quasi-criminal disciplinary proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS xviii

TABLE OF AUTHORITIES xix

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS & RULES . . . 3

STATEMENT OF THE CASE 7

THE QUESTIONS ARE SUBSTANTIAL 24

-Timeliness. 57

CONCLUSION 61

LIST OF APPENDICES . . . . . .following p. 61

APPENDICES . . . pp. foll. LIST OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Alcorta v. Texas 355 U.S. 28 52

Application of Gault (1967)
387 U.S. 1, 33 . . . . . 36, 37

Brady v. Maryland (1963)
373 U.S. 83 51

Cardona vs. Quinones (1916)
240 U.S. 83. 60

Cole vs. Arkansas (1948) 333 U.S. 196 . . 33, 35, 40

Connecticut vs. Johnson (1983)
460 U.S. 73 . . . . . i, 6, 26

Davis vs. Alaska (1974)
415 U.S. 308 53

Davis vs. Wechsler (1923)
263 U.S. 22. 60

DeJonge vs. State of Oregon
299 U.S. 353, 362 35

Douglas vs. Alabama (1965)
380 U.S. 415, 418-420 53

Furman vs. State Bar (1938)
12 C.2d 212, 214, 229; 83 P.2d 12 . . . 25, 33

Goldberg vs. Kelly (1970)
397 U.S. 254, 271 42

Golden vs. State Bar (1931)
213 C.237, 247; 2 Pac.2d 325 33

Gray vs. State Bar (1936)
7 C.2d 177, 180, 59 P.2d 1033 25

Herrscher vs. State Bar (1935)
4 C.2d 399, 401, 49 P.2d 832 . . . . . 25, 33

Hildebrand vs. State Bar (1941)
18 C.2d 816, 834, 117 P.2d 860 25

In Re Murchison (1955)
349 U.S. 133, 136 . . . . . vii, 42, 50

In Re Oliver (1948)
333 U.S. 257, 273, 274 . . . . . 43, 45, 46

In Re Petersen (1929)
208 C. 42, 46, 53, 280 P. 124 25

In Re Ruffalo (1968)
390 U.S. 544, 551 52

In Re Shattuck, (1929)
208 C. 6, 9; 279 Pac. 998 25

In Re Winship (1970)
397 U.S. 358. . . . . vi, 36

Kwock Jan Fat vs. White (1920)
253 U.S. 454, 458-459 48

Mathews vs. Eldridge (1976)
424 U.S. 319, 330-322. 60

Miller vs. Norvell (1985)
11 Cir. 775 F.2d 1572, 1576 26

Morgan vs. United States (1936)
298 U.S. 468, 480-481 47

Ohio Bell Telephone vs. PUC (1937)
301 U.S. 292, 304-305 47

Peters vs. Kiff (1972)
407 U.S. 493, 502 42

Phillips vs. Phillips (1953)
41 Cal.2d 869, 875; 264 Pac.2d 926. 59

Pointer vs. Texas (1965)
380 U.S. 400, 405-407 53

Rosenthal vs. State Bar of California (1987)
43 C.3d 612; 238 Cal.Rptr. 377 . . . . . 1, 2

Roviaro vs. United States
353 U.S. 53, 61-62 46

Sacher v. United States
343 U.S. 1 50

Sandstrom vs. Montana (1979)
442 U.S. 510 . . . . . i, 1, 6, 26

Schullman vs. State Bar (1963)
59 C.2d 590, 599, 30 C.R. 834,
381 P.2d 658 25

Schware vs. Board of Bar Examiners
353 U.S. 232, 246-247 35

Thompson vs. Louisville (1960)
362 U.S. 199, 206 34

U.S. vs. Gomez (1965)
70 U.S. 752. 60

Van Tiger vs. Superior Court (1936)
7 Cal.2d 277, 60 Pac.2d 851. 58,59

Washington vs. State of Texas (1967)
388 U.S. 14, 18 46

Werner vs. State Bar (1939)
13 C.2d 666, 673, 91 P.2d 881 25

Wilde v. Wyoming
362 U.S. 607 52

Willner vs. Committee (1963)
373 U.S. 96, 105 . . . . . 48, 50, 52

Zitny vs. State Bar (1966)
64 C.2d 787, 789, 51 C.R. 825,
415 P.2d 521 25

STATUTES

Business & Professions Code

Section 6049.1 . . . . . i, 4, 27

Section 6049.2 . . . . . ii, 5, 29

Section 6083(c) . . . . i, 1, 4, 6, 26, 27

U.S. Constitution

28 U.S.C. Section 1257(2) 3

14th Amendment, i, ii, iv, vi, vii, viii, ix, xi, xii, xiii, xiv, xv, xvi, xvii, 1, 4, 28, 31, 33, 34, 37, 39, 40, 43, 46, 48, 50-52, 54-56, 60

5th Amendment, 60

6th Amendment, ii, iv, ix, xiv, xvi, xvii, 3, 28, 31, 34, 39, 40, 44, 46, 55, 56

8th Amendment, iv, viii, xvii, 4, 32, 45, 56

MISCELLANEOUS

Rule 27(e). 59,60

Witkin, California Procedure, Third Edition, Section 63, p. 497. 59

Witkin, California Procedure, Third Edition, Attorneys, Section 477 34

Witkin, California Procedure, Third Edition, Attorneys, Section 511 25

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL, Appellant, appeals from the Feb. 18, 1988 final Judgment of the Supreme Court of California, denying Petition for Rehearing (Appendix 3) of Opinion styled **Rosenthal vs. State Bar of California** (1987) 43 C.3d 612; 238 Cal.Rptr. 377, rejecting Appellant's constitutional attack that California statute (**B & P Code Section 6083(c)**) is facially unconstitutional under the **14th Amendment** due process clause because it casts the burden of proof of innocence upon the Appellant (accused lawyer), which action (casting the burden of proof of innocence upon accused lawyer) can never be harmless, either on the ground that intent was not at issue, or that **Sandstrom** error could be harmless on the ground of "overwhelming evidence".

OPINIONS BELOW

The Order of Feb. 18, 1988 (Final Action) of the Supreme Court of California, denying Appellant's Petition for Rehearing appears as Appendix No. 3.

The Opinion of the Supreme Court of California, **Rosenthal vs. State Bar** is reported at 43 C.3d 612, 238 Cal.Rptr. 377, 738 P.2d 723 (1987). (To conserve bulk, the Opinion is not reprinted in Appendix.)

The findings and recommendation of Appellee (Local Administrative Committee No. 53), the administrative arm of the Supreme Court of California, dated December 17, 1985 transmitted and filed January 3, 1986 are not reported. These findings and recommendations (called "DECISION") of that Administrative Committee of the Appellee State Bar, are in Appendix No. 1.

JURISDICTION

The final judgment (entered Feb. 18, 1988, Appendix 3) of the Supreme Court of California denying Appellant's Petition for Rehearing of its previous Opinion disbarring Appellant entered on July 13, 1987, effective August 12, 1987. See **Timeliness**, p. 57,et.seq.

A Notice of Appeal to this Court from that Final Judgment was timely filed in the Supreme Court of California on Feb. 29, 1988 (dated Feb. 25) (Appendix 5).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. See **Timeliness**, p.57,et.seq.

The jurisdiction of this Court is invoked under **28 U.S.C. Section 1257(2)**.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor . . . ."

Eighth Amendment, U.S. Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

14th Amendment, U.S. Constitution, Section 1:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Business and Professions Code, Cal Statute, Section 6083(c):

"Time For Review"

"(c) Upon such review the burden is upon the Petitioner to show wherein the decision or action is erroneous or unlawful."

Business and Professions Code Section 6049.1- Records and Transcripts in Disciplinary Proceedings As Evidence:

"In all disciplinary proceedings in this State, certified or duly authenticated copies of findings, conclusions, orders or judgments made or entered in any court of record, or any body authorized by law

or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any State or Territory of the United States or of the District of Columbia in any disciplinary proceedings therein against the same person, shall be admissible in evidence, and so far as relevant and material shall be prima facie evidence of the facts, matters and things set forth therein."

"The duly authenticated transcript of the testimony taken in such out-of-state proceedings shall be admissible in evidence in any disciplinary proceeding against the same person in this State . . . ."

Business and Professions Code, Section 6049.2:

"In all disciplinary proceedings pursuant to this chapter, the testimony of a witness given in a contested civil action or special proceeding to which the person complained against is a party, or in whose behalf the action or proceeding is prosecuted or defended, may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the non-availability of the witness; provided, the board or administrative committee may order the production and testimony by such witness, in lieu of or in addition to receiving a transcript of his testimony and may decline to receive in evidence any such transcript or testimony, in whole or in part, when it appears that the testimony was given under circumstances that did not require or allow an opportunity for full cross examination."

Appellant's claim of the facial unconstitutionality of the California Statue [Business and Professions Code, Section 6083(c)] was presented extensively before the court of last resort (Supreme Court, California) and Appellant, prior to deliberations of California Supreme Court, transmitted to that Court copies of the opinions of This Court in the cases of Sandstrom vs. Montana (1979) 442 U.S. 510; 99 S. Ct. 2450; 61 L. Ed. 2d, and Connecticut vs. Johnson (1983) 460 U.S. 73; 103 S. Ct. 969; 74 L. Ed. 2d 823, and thus, Appellant fully exhausted the Federal jurisdictional question in the court of last resort of California.

Appellant had previously raised federal constitutional questions (as in "**QUESTIONS PRESENTED", supra**) during Appellee's (Committee) conduct of disciplinary proceedings, and during Appellee's Review Department's "hearing", and in motions before Committee and Review Department. Appellant's

attacks were rejected by Appellee (Committee and Review Department), and finally by California Supreme Court.

STATEMENT OF THE CASE

The Appellant, JEROME B. ROSENTHAL, admitted to the practice of law in Illinois in 1936, in California in 1946, has lived and practiced in Los Angeles County, California since 1946.

In December, 1968, following the death of Martin Melcher, April 20, 1968), his widow Doris Day Melcher and her son, Terrence P. Melcher, filed complaint against Appellant with the State Bar of California. (Appellant was not permitted to, and did not see the Complaint itself until 18 years later, i.e. 1986), after completion of all evidentiary hearings, and Appellee's recommendation (culpability, disbarment) was made.

In January, 1973 the Local Administrative Committee No. 2, of Appellee (STATE BAR), issued and served upon Appellant its "NOTICE

TO SHOW CAUSE" notifying Appellant (for the first time) of the specific charges against him; Notice was by its terms returnable before the (Appellee) Local Administrative Committee No. 53. The accusations contained in the Notice To Show Cause ("NSC") were that Appellant, who had represented Martin Melcher (deceased), his widow, Doris Day Melcher, since in or about 1956, and later represented Terrence Paul Melcher (son of decedent and widow) individually and as administrator of estate of Martin Melcher, Deceased, alleged that Appellant unreasonably delayed returning Melcher records, refused to make an accounting; that it was necessary for Doris Day Melcher to have a receiver appointed in order to get her books, records and files; that Appellant filed Petition To Remove Terrence P. Melcher as Administrator without substantial basis, and for purpose of harassing; that Appellant's refusal to furnish files and records to Melcher,

substantially prejudiced Melchers' ability to assess the validity of creditor's claims asserted against them and impeded their ability to defend against lawsuits that Appellant caused to be filed against them; that Appellant caused a bankruptcy proceeding to be filed in Dallas, Texas without "requisite statements and schedules" and failed to file timely Schedules as requested by Bankruptcy Court; that plan of arrangement filed by Appellant was a sham and filed in bad faith, interposed only to delay Bankruptcy Court's disposition on merits; that Appellant caused to be filed exaggerated creditors' claims, in the Bankruptcy proceeding, so that Melchers' plan of arrangement was deprived of the requisite "majority approval" as to the amount of claims, and that Melchers' plan was thus prevented from being confirmed; that for a period of several months in 1969, Appellant obstructed the proceedings in the Dallas bankruptcy case through misrepresentations

made in the case; that Appellant engaged in certain conduct in Dallas case to delay commencement of the trial; that during trial in the Dallas case, Appellant obstructed the proceedings; that Appellant testified that his law firm had not received payments for services rendered to Dallas Hotel, while, in fact, his law firm had received fees from Dallas Hotel for services to Dallas Hotel; created and pursued interests which were adverse to interests of client Melchers; that Appellant was overpaid by entities in which client's owned interests; that Appellant improperly refused to be deposed in an action in which Melchers were among the defendants; that Appellant advised Administrator Melcher to authorize making of certain payments, some of which payments were beneficial to interests of Appellant, which was not revealed to Administrator client; that Appellant instituted numerous lawsuits for the sole purpose of harassing former client; that

Appellant served Melcher clients in connection with purchase of Federal Bonds with borrowed funds, while Appellant purchased same kind of bonds for himself, but paid less interest on borrowed funds than interest paid by Melchers.

Each and all of the accusations made in the above stated charges (in NSC) were and are categorically and unequivocally denied by Appellant, both in his Answer to NSC, and thereafter, throughout all proceedings.

The relevant facts that led to the accusations contained in the Notice To Show Cause ("NSC") are summarized as follows:

(1) Appellant and his law firm(s) represented Doris Day Melcher and Martin Melcher commencing in mid-1950s. The services performed for the Melchers were of a type which was then unique, and now commonplace, particularly in the fields of entertainment, communication and professional sports; those services were "ongoing" and rendered virtually daily by Appellant, his firms and personnel.

Services included financial advice and administration, opinions as to financial and tax planning, maintenance of records of transactions, and preparation of documents in connection with transactions contemplated and consummated; with associated and related activities.

(2) In 1963, Appellant individually (after three years of invitation and persuasion from Martin Melcher) entered into an arrangement/agreement with Martin Melcher in which Appellant was to act as chief executive or operating official of the "Melcher empire" (Mr. Melcher's designation), substantially curtailed his personal activities as an attorney in his law firm; Appellant agreed at request of Martin M. Melcher to make investments and share (along with Martin M. Melcher) in benefits and proceeds of some phases of "empire". The empire resulted from the flourishing of the

respective individual incomes of the two Melchers, (hers as actress, etc., his as theatrical producer, personal manager, publisher, etc.) and from the activities of Appellant's firm on behalf of the Melchers and related companies. Since the inception of Appellant's firms' representation of Mrs. Melcher, she referred and delegated all business authority and directed all persons approached her on business matters, to her husband Martin. She professed and manifested limited interest in discussing or considering her financial affairs upon occasions when Appellant or Appellant's firms attempted to or did in fact discuss her business affairs with her, saying, in substance, "I'm the actress, see my husband about business affairs."

(3) In agreeing to undertake the duties as the "chief operating official" of the Melcher empire, Appellant relied upon the commitments of both Melchers (he had her Power

of Attorney and unlimited authority), to supply any necessary funding of operations of elements of the "empire plan." Under that Empire Agreement (1963), Appellant (and personnel supplied by his law firm) were to render services in conducting active operations, and in supervising ongoing business enterprises, their pursuit and expansion. But prior to the 1963 "Empire Agreement" the services of Appellant and his law firms were restricted to only passive financial interests and investments of the Melchers.

(4) The objectives of the Melchers (developed, refined and originated by Mr. Melcher, with assistance of Appellant and his law firm), and the methods of tax planning incident to carrying out of the "Empire Plans" were all highly tax-oriented as well as profit-oriented, with increasing intensity during the years from 1956 through 1968 (and

thereafter, but for the unfortunate demise in April, 1968 of Mr. Melcher).

(5) The empire plan was designed by Mr. Melcher (as were other preceding and related plans for his and his wife's investments and the use of various funds) to postpone the imposition of income taxes to the extent lawfully possible, and to postpone receipt of additional income (other than that necessary or incident to maintenance of the needs of the empire plan) until their incomes from their activities in the theatrical and related fields diminished. In short, all of the investment and related financial activities were designed with "long-term objectives"; it was never the intention of Martin Melcher ("empire's" architect) that operations were to be "abruptly terminated". His plan was that ultimate disposition and liquidation of the "empire plan" were steps to be taken only when financially propitious, as for example, "going

public", making "non-taxable re-financing", selling the empire assets or some of them, after they had substantially appreciated in value and after tax benefits incident to their retention had significantly diminished or depleted.

(6) Following the tragic demise of Martin Melcher, Appellant, his law firm and related companies attempted to carry out the brilliant and prophetic planning of Martin Melcher consistent with his "empire plan"; Appellant and his law firm(s) were seeking to insure that benefits of Melcher's "empire plan" would be enjoyed by Mrs. Melcher, by the estate of Martin (decedent) and through the estate, by persons interested in it, its creditors, and by Appellant, his law firm and related companies, all as intended by Mr. Melcher in the conceiving, devising and implementing and setting into motion the various elements of the "empire plan",

consistent with the underlying investment philosophy of Martin in other Melcher investments.

(7) Until Martin Melcher's death, Doris Day Melcher had consistently and expressly avoided any participation or willingness to consider any business or financial matters [Supra, p. 14 paragraph (2)]. Unaccountably, immediately upon the death of Martin, Mrs. (Doris Day) Melcher abruptly reversed her position. Notwithstanding the reliance by others that she had induced and invited to rely on her Husband's authority in committing her, she repudiated the authority and attacked transactions made in reliance upon it. (Appellant later learned that conceivably Doris Day Melcher was not to be "blamed" for that abrupt repudiation, since she was acting upon her then reliance on the advice of newly engaged counsel and other advisors who represented her and her son, Terrence P.

Melcher (co-complainant in disciplinary proceedings, along with her) following Mr. Melcher's death and following discharge of Appellant and his law firm in May and July, 1968.

(8) Following their discharge by Doris and Terrence P. Melcher (son of decedent and Mrs. Melcher, in his individual capacity and in his capacity as administrator of decedent) Appellant commenced or caused litigation in Los Angeles Superior Court against Doris Day Melcher, Estate of Martin Melcher, Terrence P. Melcher, et al., (collectively "Melcher parties") seeking, inter alia to recover (a) fees to which Appellant and his firm were entitled, (b) to recoup advances made by Appellant, et al., (c) seeking to enforce Melcher parties' continued funding, when necessary, of the "empire" and (d) seeking damages, consistent with Melcher parties' commitments. The Melcher parties cross-

complained in one action and instituted a separate action against Appellant, et al. The allegations in the separate action paralleled those contained in the cross-complaints and answers by Melcher Parties, in the twelve suits instituted by or through Appellant against Melcher parties. The thirteen (13) suits, consolidated, went to trial before Hon. Lester E. Olson, Los Angeles Superior Court on March 4, 1974. Evidentiary proceedings ended September 18, 1974 (ninety-nine Court days); judgment entered against Appellant et al., in their respective positions as Plaintiffs seeking affirmative relief, and also in favor of Melchers on their cross-complaints against Appellant, et al, as Cross-Defendants.

(9) In addition to those Los Angeles suits, Appellant and related parties instituted or caused suits in New Mexico, Oklahoma and Texas, in connection with the interests of the Melchers and others,

including Appellant, et al. The "new attorneys" of Melcher parties, in the Fall of 1968, demanded that Appellant participate in the authorizing, preparation and filing of a Chapter 11 "arrangement" proceeding in Texas (Bankruptcy Court) designed to prevent foreclosure or other creditor actions against Dallas Cabana Hotel property. Appellant resisted on the ground that such action would be unnecessarily destructive of value of the property, would constitute an impermissible reversal of the "empire plan" and a repudiation of commitments made by the Melchers pursuant to it, and for related reasons. Under protest, and under threat (by Melcher parties' new attorneys) of being "held responsible" if the Hotel property were lost by foreclosure, Appellant engaged Texas counsel who filed Chapter 11 petition. That insistence by surviving Melchers on such an improvident and misguided course of action was directly contrary to the "empire plan" and was

by its very nature unnecessarily destructive and sacrificial. The Melchers and their new attorneys caused virtual economic suicide, as later events established.

(10) In or about 1970, incident to the Dallas Bankruptcy, the two hotels in which the Melcher parties owned a substantial interest were sacrificially sold for approximately $7-3/4 million, less costs of administration, and other legal fees and expenses, estimated at $500,000.00 or more. The sale of the two hotels thus produced a net yield of $7-1/4 million, or less, for both hotels. Those very self-same hotels were professionally evaluated in 1974 at $25 million dollars and, in 1986, at $50 million. During the interim the two hotels could readily have been operated (consistent with the empire plan of decedent, Martin Melcher) as profit-yielding, self-sufficient enterprises, or with decreasing need for supplemental funding from other

sources, all as anticipated by Mr. Melcher's "empire plan."

(11) The "empire" also contained a substantial interest in 80,000 acres of mineral leases. In 1965, 10,000 acres (1/8 of the total) were sold, as decided by Mr. Melcher, to Texaco for $1 million ($100.00 per acre), less adjustments of about $150,000.00, plus a retained fractional interest, the value of which is safely estimated to equal or exceed the "adjustment" amount. At the time of this transaction, the prevailing oil price was $\pm$ $3.00 per barrel.

In 1965, if the sale of the remaining 70,000 acres were made at the 1965 price, when prevailing price was $3.00 pr./barrel, the yield of such transaction would have been $7 million.

The 1974/75 value, if sale of those remaining acres were made when the prevailing oil price was $30.00 pr./barrel, would have

yielded $70 million.

In the interim (1965-1975) or post 1975 value, of the sale of remaining 70,000 acres, when the prevailing oil price was $10.00 pr./barrel, would have yielded $21 million.

(12) In 1968, following Mr. Melcher's death, the Melcher parties (following advice of new attorneys) refused to pay from sources which decedent Mr. Melcher had anticipated and committed, the nominal "holding" or "delay" rentals, with the end result that the remaining valuable mineral leases were lost by simple abandonment and reversion, and thus rendered worthless to the Melcher parties, estate, other interested parties (including Appellant) and others reliant upon commitment of Melchers. The nominal rentals were approximately $1,500 per month, or not to exceed $20,000 per year. Thus, surviving Melcher parties, acting on advice of new attorneys, lost their interest in properties

(mineral leases) which had a value ranging from $7 million to $70 million.

(13) In sum, the values lost in the two hotels and in the mineral leases ranged from $25 million to $113 million, due entirely to the advice of "new attorneys", and surviving Melchers' understandable reliance upon it; new attorneys fees and charges exceeded $2 million. Incident to that Melcher-loss result Appellant, his law firm(s), and others who relied on "Melcher Plan" commitments made by decedent Melcher (fully authorized), lost millions in unpaid compensation earned, in unrecouped advances and charges, and in the value(s) of their interests in the "sacrificed" properties alone.

THE QUESTIONS ARE SUBSTANTIAL

(Numbers in this Section correspond to numbers used in "QUESTIONS PRESENTED" Section, supra)

1. The California Supreme "Court examines the

entire record, weighs the evidence, and makes an independent determination and order imposing discipline or dismissing the proceeding." Witkin, California Procedure, Third Edition, Attorneys, Section 511, citing: In Re Shattuck, (1929) 208 C. 6, 9; 279 Pac. 998; In Re Petersen (1929) 208 C. 42, 46, 53, 280 P. 124; Furman vs. State Bar (1938) 12 C.2d 212, 214, 83 P.2d 12; Werner vs. State Bar (1939) 13 C.2d 666, 673, 91 P.2d 881; Gray vs. State Bar (1936) 7 C.2d 177, 180, 59 P.2d 1033; Herrscher vs. State Bar (1935) 4 C.2d 399, 401, 49 P.2d 832; Hildebrand vs. State Bar (1941) 18 C.2d 816, 834, 117 P.2d 860; Schullman vs. State Bar (1963) 59 C.2d 590, 599, 30 C.R. 834, 381 P.2d 658; Zitny vs. State Bar (1966) 64 C.2d 787, 789, 51 C.R. 825, 415 P.2d 521.

Thus, in California disciplinary matters, the function of the Supreme Court of California is tantamount to a de novo determination, independently considering the

entire record and independently weighing all of the evidence. In the prevalent situation in California, 6083(c) (Business and Professions Code, supra) is facially unconstitutional because, in a proceeding tantamount to a trial, that statute imposes the duty upon the accused in a quasi-criminal proceeding, to establish his innocence, rather than requiring the Appellee (accuser) to establish Appellant's (accused attorney) guilt of charged violations.

Appellant (as Petitioner in California Supreme Court) both in oral argument and in written submissions, attacked the federal constitutionality of statute (B&P Code) Section 6083(c) on doctrinal grounds enunciated in Sandstom vs. Montana (1979) 442 U.S. 510 and in Connecticut vs. Johnson (1983) 460 U.S. 73, as being "void on its face". Please also see Miller vs. Norvell (1985) 11 Cir. 775 F.2d 1572, 1576.

California, our most heavily populated

state, also has the greatest number of attorneys (per capita or in absolute number). All of those attorneys are, as a matter of law, subject to the disciplinary authority of Appellee, and to the statutes providing for de novo-like review (in the California Supreme Court), inherent in Section 6083(c). In effect, the greatest number of attorneys (in any state) in the United States are subject to and have their respective licenses and livelihoods governed by a facially unconstitutional statute requiring such attorneys (like Appellant) to bear the burden of disproving statutorily presumed wrongdoing.

2. B&P Code, Section 6049.1 (full text, supra, under heading "CONSTITUTIONAL PROVISIONS, STATUTES AND RULES") provides clearly for the admissibility as evidence, in the disciplinary proceeding before the Appellee (Committee of the State Bar) of "findings, conclusions, orders or judgments",

purely hearsay in nature, made in any other Court or body authorized to conduct disciplinary proceedings. Here, over repeated and constant objection (and in repeatedly unconstitutionally applying that statute) the Committee admitted into evidence "findings, conclusions, orders or judgments", purely hearsay in nature which were made in course of tribunal which were not authorized or which were not in fact conducting disciplinary proceedings. In so doing, the Appellee, with the approval of the California Supreme Court on the point, deprived Appellant of the right of confrontation, the right of cross examination, and the right of notice of charges or accusations, under the 6th Amendment and the 14th Amendments, U.S.. It is an unthinkably and flagrantly unconstitutional application of the thrust of the statute in question when one considers the quantity of lawyers subjected to it and the frequency in which the question arises. The

number of disciplinary cases keeps rising in California, along with the number of attorney licensees.

3. Section 6049.2 California statute (Business and Professions Code) authorizes admission into evidence in disciplinary proceedings by Appellee, of "duly authenticated transcripts of testimony of witnesses" (emphasis added), in lieu of the actual live testimony of those witnesses before the Appellee's Committee of Hearing Panel), except where the testimony (in transcript form from other proceedings) was given under circumstances in which accused attorney, in other proceeding (generally civil) did not have a reasonable and adequate opportunity for cross examination of those witnesses in those "other proceedings", and of course where the "transcript testimony" of those witnesses was not relevant to the issues

before the Appellee's Committee.[4]

In the instant case, that statute was unconstitutionally applied in all three respects. First, there was before the Committee totally unrebutted or uncontradicted testimony that there was not a "reasonable and adequate opportunity for cross examination". Second, the transcripts admitted in evidence, over strenuous and repeated objection, (99 in number, consisting of over 15,000 pages) contained, in the main, hearsay statements of the Court(s) in question, comments and conclusions made from the bench, arguments of counsel, highly prejudicial comments (against Appellant) collectively herein "extraneous

---

[4]The term "Committee" and "Hearing Panel" are used interchangeably on some occasions. Actually, in the subject disciplinary proceeding the body in question was specifically called "The Committee", but the California Supreme Court in its Opinion preferred to use to so-called "more modern" phrase "Hearing Panel". It is significant that the body in question was actually a "Committee" - see Appendix No. 1, (the recommendations called "Decision" of such Committee), Page 1 thereof.

material". Third, the extraneous material was admitted over objection; these three areas of unconstitutional application of that statute present extremely substantial questions because inherent in all three types of misuse are deprivations of the rights of cross examination (6th Amendment), confrontation (6th Amendment) and of notice and hearing rights (due process, 14th Amendment). Traditionally, disciplinary complaints and procedures arise from situations in which the accused attorney allegedly conducted himself unethically, almost invariably in connection with some litigation in which he represented a client. Therein lies the "other proceeding" situation to which the subject statute refers. Thus, in a justifiably assumed majority of disciplinary proceedings, the accused, by virtue of this unconstitutionally applied statute, is literally deprived of the constitutional rights asserted with respect to Appellant immediately above. The same

objections obtained as those which obtained in the instance of the "companion statute", i.e. those referred to in Paragraph 2 immediately above. Further, because of the severity (deprivation of their property right of the license to conduct a professional livelihood) of the punitive consequences, the application of this statute also is a deprivation of the right against "cruel and unusual punishment" under the **8th Amendment, U.S.**.

4. Appellant was deprived of due process by admission into evidence (over objection) of uncharged offenses and by a finding of conclusion of guilt or culpability of such uncharged offenses. This violation is explicit in the instant situation because the actual "recommending document" called "Decision" (Appendix 1) of the Local Administrative Committee No. 53 (of Appellee, arm of the California Court of Last Resort). Page 15 of the **"DECISION"** states in pertinent

portion (Line 13) "in addition to the matters alluded to above, the evidence also permits the finding that Respondent (Appellant here) committed other offenses not specified in the NOTICE TO SHOW CAUSE." (Emphasis added). In this situation, this Court found that introduction of such evidence and such a finding or conclusion of guilt based thereon violated due process rights under the 14th Amendment, in Cole vs. Arkansas (1948) 333 U.S. 196 where, at Page 201 this Court stated:

> "No principle of procedural due process is more clearly established than that notice of specific charge, and the chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all Courts, state or federal."

Of course, it is undisputed and now well-settled that the subject disciplinary proceedings here concerned constitute or are in fact "quasi-criminal" in nature. Golden vs. State Bar (1931) 213 C.237, 247; 2 Pac.2d 325; Furman vs. State Bar (1938) 12 C.2d 212, 229; 83 Pac.2d 12; Herrscher vs. State Bar

(1935) 4 C.2d 399, 403, 421; 49 Pac.2d 832.

The substantiality of this question is further illustrated by this observation:

> "The attorney whose professional license is challenged has as much at stake as the defendant in many a criminal prosecution, and should be similarly protected in the trial of serious charges."
> **Witkin, California Procedure, Third Edition, Attorneys** Section 477, pp. 526-527.

5. In the case at hand, there was absolutely no legal or competent evidence in the record to support Appellant's guilt of the charges. Applying the "no evidence" criterion of **Thompson vs. Louisville** (1960) 362 U.S. 199, 206, since there is no support in the record (i.e. no evidence), the order or judgment of disbarment is void as a denial of due process right as guaranteed by the **14th Amendment**[5]. Appellee called and used witnesses only tangential to, but not on the merits (guilt or

---

[5]Denials of Rights: Confrontation and cross-examination (6th Amendment); uncharged offenses (due process, 14th Amendment)

innocence of Appellant); absolutely no witnesses whatsoever were called to prove "guilt or innocence" merits; instead, hearsay documents containing expressions of opinion, conclusions, arguments, from other states and other proceedings (not in any respect from the disciplinary proceeding in question itself) comprise the entirety of the "accuser's" (Appellee's) evidentiary case against Appellant. "Just as 'Conviction upon a charge not made would be sheer denial of due process' (citing **DeJonge vs. State of Oregon** 299 U.S. 353, 362; and **Cole vs. Arkansas** 333 U.S. 196, 201) so is it a violation of due process to convict and punish a man without evidence of his guilt," citing **Schware vs. Board of Bar Examiners** 353 U.S. 232, 246-247; where there is no evidence of guilt, accused cannot be convicted or punished because the "conviction" is void under due process rights.

6. Because of the deprivation of profound

fundamental personal right (right to livelihood, and to practice profession) involved in disciplinary proceedings (undisputedly "quasi-criminal" in nature), the standard of proof required for such deprivation (ascertainment of guilt) must be consistent with due process, requiring proof beyond a reasonable doubt, as to each and all of the elements of the accusation.

In Gault, this Court held "due process of law requires notice of the sort we have described - that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding." Application of Gault (1967) 387 U.S. 1, 33; In re Winship (1970) 397 U.S. 358.

In Winship, supra, this Court referred to its decision in Gault, supra:

> "We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for 'a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in

seriousness to a felony prosecution'". Application of Gault (1967) 387 U.S. 1, 36.

The question of the "applicable standard of proof" is an extremely substantial question postulated here; the incidence (quantitative) of disciplinary situations is widespread, the "deprivation" at stake is profound and fundamental (right to livelihood, right to practice profession which constitutes lifetime study and application, etc.).

7. Appellee's hearing Committee, by its extreme bias and prejudice, violated Appellant's 14th Amendment due process rights, as illustrated by this conduct or omission by the Committee (the recommendations for disbarment of which Committee were adopted by Appellee Review Department, and by California Supreme Court):

(a) Years of repeated assurances were made by Committee that Appellant would be "always" (at any time during, at the end of,

or after the hearings) given the opportunity to fully put on his defense, to call, subpoena and cross-examine witnesses, and "at any time" to remake or make motions to strike incompetent prejudicial testimony pursuant to agreed "running objection". But without cause, reason or explanation the Committee abrogated all of those promises and assurances, on which Appellant had relied, thus depriving him of all of his constitutional rights inherent in his defenses to the accusation;

(b) After first stating and assuring Appellant that the Committee would not read, use or admit hearsay or otherwise incompetent transcripts from "civil trials", or testimonial portions thereof, unless and until Appellant had an opportunity to read and consider in advance the <u>selected relevant portions</u>, the Committee again without explanation, cause or reason abruptly reversed itself, abrogated its assurances to the

contrary, admitted on its own motion some 15,000 pages of "civil trial transcript" (99 volumes), directly in contravention and repudiation of its promises to the contrary, as well as directly in violation of all due process rights and including the **6th Amendment** rights to confrontation and cross examination, rights of compulsory process, the right to be informed (notice), and deprived him further of due process rights guaranteed and embraced by the **14th Amendment**;

(c) The Committee in its recommendation of disbarment, determined that Appellant was culpable or guilty of infractions regarding named "clients", when the persons in question were simply (and undisputedly) not clients of the Appellant at the time in question;

(d) The Committee expressly stated in its written recommendations of disbarment (adopted by California Supreme Court) that Appellant had "committed other offenses" which were specifically not mentioned in the accusing

document ("Notice to Show Cause"), in clear defiance of the teachings of **Cole vs. Arkansas** (1948) 333 U.S. 196, and in blatant deprivation of "Notice and Hearing" rights under the **6th Amendment** and under the due process concepts of the **14th Amendment**;

(e) The Committee further clearly manifested its extreme bias and prejudice by including within its recommendations totally insupportable and unsupported accusations against the Appellant, arising from total hearsay sources, including but not limited to out of state civil actions related and unrelated to the disciplinary proceeding; in its written recommendation the Committee further displayed its extreme bias and prejudice by accusing Appellant (without any notice and hearing and certainly without any evidentiary support) of objectionable conduct, without any facts or competent evidence. In this instance, the Committee merely gave vent to its prejudice by expressions of extreme

disfavor, in the ultimate recommendations of guilt and of discipline, but gave Appellant absolutely no explanation or opportunity to meet the charges upon which (in this instance) it rested its severe recommendations.

(f) In addition, without here detailing each of the many other manifestations of bias and prejudice, also demonstrated that animus by depriving Appellant of opportunity to present evidence in his own defense, by depriving him of the right of compulsory process in a most important incident in which it issued its own subpoena duces tecum only to later abrogate, quash it on its own motion, and totally disregard and refuse to enforce it; allocating to Appellant some three or four months for "briefing", but permitting or allocating the adversary (Appellee herein) over one and-one-half years (without explanation of justification), read and considered secret documents, shared the secrets with Appellee's Trial Examiner with

any evidence, but concealing the content of the document(s) from Appellant.

It is well-settled that a fair trial in a fair tribunal is a basic requirement of due process. **In re Murchison** (1955) 349 U.S. 133, 136. Due process requires a competent and impartial tribunal in the administrative hearings. **Goldberg vs. Kelly** (1970) 397 U.S. 254, 271. Even if there is no showing of actual bias in the tribunal, due process is deemed to be denied by circumstances that create the likelihood or appearance of bias. **Peters vs. Kiff** (1972) 407 U.S. 493, 502. As this Court stated in **In re Murchison**, supra, 349 U.S. at page 136:

> "Fairness of Courts requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

8. Although arising from the same conduct as the corresponding acts of the Committee described immediately above in Paragraph 7, the Committee (Appellee) and the Supreme Court

of California deprived Appellant of his due process fair hearing rights under the **14th Amendment** where Appellant justifiably relied on repeated promises throughout the entire period of some nine years of hearings, made by the Committee, refrained from presenting evidence in keeping with such reliance, and was ultimately and abruptly refused the promised opportunity and right to present evidence in his defense, by the Committee's abrogation and repudiation of the repeated promises.

This Court has held:

> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge. . . .was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in Court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony. . .". (Emphasis added)
> **In re Oliver** (1948) 333 U.S. 257, 273, 274.

9. Whether the intentional unilateral delay

by Appellee was 18 years (or 10 years, or only 7 years) for the pendency and conducting of the disciplinary proceeding, such a delay (estimated years are net, after deduction of any request for continuances made by Appellant for reasons of health or schedule conflicts), such protraction presents at least two very substantial questions. First, since the transactions and events with which the disciplinary proceedings were concerned were as old as thirty years, i.e. from the middle 1950s, to the conclusion of Appellee's conducted proceedings, 1985 - 1986, obviously no fair hearing for Appellant could result. Witnesses died, witnesses became "unlocateable", memories faded, and in some instances documents became unavailable or lost. Secondly, in these quasi-criminal proceedings, there is the very substantial question of compliance with the "speedy trial" requirement of the 6th Amendment, presented by such delay. Finally, the duration and

continued, uninterrupted pendency of such oppressive action (disciplinary proceeding itself) hanging over the head of Appellant is, "ordeal enough" or "punishment enough", as well as constituting "cruel and unusual" punishment under the 8th Amendment. The substantiality of these questions and subquestions is enhanced in the instant situation where Appellant has persistently maintained his absolute innocence, and denied any guilt whatsoever.

10. The right of the accused (Appellant) to know of the nature of the charges against him is a profoundly substantial and inalienable right; that right has been flagrantly violated and contravened by the acts of Appellee and California Supreme Court in refusing Appellant the right to see the "secret information" writing which Appellee and its Trial Examiner "shared" (to the exclusion of Appellant), to the prejudice of Appellant. See In re Oliver

(1948) 333 U.S. 257, 272-274. As stated in **Oliver**, this inalienable and fundamental right is protected by the due process clause of the **14th Amendment**. See also, **Roviaro vs. United States**, 353 U.S. 53, 61-62.

11. Appellee denied Appellant the right and opportunity to use compulsory process to obtain evidence of his defense. "The right of an accused, in quasi-criminal proceedings, to have compulsory process for obtaining witnesses in his favor stands in no lesser footing than the other 6th Amendment rights that we have previously held applicable to the States." **Washington vs. State of Texas** (1967) 388 U.S. 14, 18, citing **In Re Oliver** (1948) 333 U.S. 257.

12. Appellee (Review Department) deprived Appellant of substantial rights to due process and to equal protection, guaranteed by **14th Amendment**, by denying Appellant an

"evidentiary hearing" (after a representation that "hearings" would be accorded Appellant), refused to independently review the record in Appellant's case (although it was required to do so by applicable Rules, and consistent with its uniform practice in other cases) in adopting (without change) recommendations of Committee that Applicant be disbarred. The Review Department also acted in violation of "En Banc Hearing" (mandatory requirement) in adopting recommendations of Committee for disbarment; and Review Department (of Appellee) allocated to Appellant only ten minutes of time within which to review "hundreds of thousands of pages to be reviewed", while in other cases uniform practice allowed "five minutes" in situations in which only one hundred or "hundreds of pages" (or less) of record were in question. Ohio Bell Telephone vs. PUC (1937) 301 U.S. 292, 304-305; Morgan vs. United States (1936) 298 U.S. 468, 480-481; Morgan vs.

United States (1938) 304 U.S. 1, 18-19; **Kwock Jan Fat vs. White** (1920) 253 U.S. 454, 458-459; **Willner vs. Committee** (1963) 373 U.S. 96, 105.

13. Appellee's and California Supreme Court's traditional and deeply ingrained deference to recommendations of Committee (of Appellee) is an unconstitutional deprivation of **14th Amendment** due process rights. The tradition and policy are based upon the assumption that "great weight must be given to testimonial evidence", because Appellee hearing Committee had the opportunity to observe the demeanor of the witnesses who testified. In this case, the recommendation of Committee (hearing body) is based solely upon documentary evidence (incompetent, at that), and not on evidence of witnesses and their demeanor"". There were no witnesses whatsoever to be observed by hearing Committee (or hearing body) who testified concerning the

merits, i.e. concerning or supporting "guilt".

14. Appellant's livelihood and lifelong right to practice profession are at issue. The State's Court of only and last resort promises and guarantees that it will fully review all of the evidence and record[6], but fails to do so. Such failure arises from physical impossibility because of the "eleventh hour" special, pro tem, appointment of two of its seven justices. Its Opinion expressly states that the disbarring Opinion is "unanimous". The statement is false because the two temporary appointees could not possibly (physically) have reviewed all of the

---

[6]In Re Shattuck (1929) 208 Cal. 6, 11; In Re Petersen (1929) 208 C. 42, 46, 53, 280 P. 124; Furman v. State Bar (1938) 12 C.2d 212, 214, 83 P.2d 12; Werner v. State Bar (1939) 13 C.2d 666, 673, 91 P.2d 881; Gray v. State Bar (1936) 7 C.2d 177, 180, 59 P.2d 1033; Herrscher v. State Bar (1935) 4 C.2d 399, 401, 49 P.2d 832; Hildebrand v. State Bar (1941) 18 C.2d 816, 834, 117 P.2d 860; Schullman v. State Bar (1963) 59 C.2d 590, 599, 30 C.R. 834, 825, 415 P.2d 521.

record and evidence within the time available to them. To predicate the revocation of license (livelihood) on such a false premise and statement makes a mockery of, and is a shameful deprivation of due process under the **14th Amendment**. **In Re Murchison** (1955) 349 U.S. 623; **Sacher v. United States** 343 U.S. 1; **Willner v. Committee** 373 U.S. 96, 105.

15. The "Trial Examiner" (Prosecutor) showed to the Hearing Committee a writing which Prosecutor and Committee read and considered, but which Committee, at request of Prosecutor, refused to allow Appellant ("accused") to see, thus a "secret writing" to Appellant.

The Prosecutor also made several flatly false material statements (highly prejudicial to Appellant) to the Appellee (Committee, Review Department). The "disbarment" Opinion, in material aspects, rests upon the misstatements as if they were true.

The Prosecutor manufactured "evidence" by

making statements concerning matters of which he had no knowledge, as if they were facts. In his brief he pointed to absolutely no evidence whatsoever to support his statements, inferences of accusatory conclusions. Appellant was prevented from replying to those falsities by Committee which refused "equal briefing time" (one year less than Prosecutor's) to Appellant, and thus refused to allow Appellant to file any brief at all.

These intentional, blatant and continuous acts of misconduct were committed by seasoned and experienced trial lawyers, leaving no doubt that the misconduct was carefully contrived and calculated to the result of determination of culpability and guilt. Such misconduct and the resulting determination of guilt and imposition of punishment violated Appellant's due process rights to a fair trial, as guaranteed by **14th Amendment**. **Brady v. Maryland** (1963) 373 U.S. 83.

Although Appellant brought these

misconduct matters to the attention of the Court of last resort, that Court allowed the injustice and falsities to go uncorrected. Alcorta v. Texas 355 U.S. 28; Wilde v. Wyoming 362 U.S. 607.

16. The vast disparity of time allotted for briefing (1-1/2 years to "quasi-prosecutor", and four months to accused attorney), and ultimate denial to accused of his right to file any brief whatsoever, constitutes clear deprivation of Appellant's due process, equal protection, and fair hearing rights under the 14th Amendment. In Re Ruffalo (1968) 390 U.S. 544, 551 expresses the policy of this Court that disbarment proceedings are adversary, are quasi-criminal, and the attorney "is accordingly entitled to procedural due process . . . ". Ruffalo, supra, 390 U.S. 544, 550. Also see Willner vs. Committee (1963) 373 U.S. 96, 105.

17. It is well-settled that the right of cross-examination is the primary interest secured by the confrontation guarantee, and an essential safeguard of a fair trial. **Pointer vs. Texas** (1965) 380 U.S. 400, 405-407; **Douglas vs. Alabama** (1965) 380 U.S. 415, 418-420; **Davis vs. Alaska** (1974) 415 U.S. 308 (no specific showing of prejudice is required), and thus the harmless error doctrine is not applicable.

18. Appellant's Petition for Review (dated October 20, 1986) directed to State Supreme Court, at p. 40, complained of the unlawful procedures of Appellee which deprived Petitioner (here Appellant) of "his due process right to a fair hearing" (Par. 11), and stated "In this case, there is utter failure - when Petitioner (here Appellant) and others like him caught 'in the system', have been exposed to the unthinkable, if not disgraceful, actions of the Committee

(Appellee here), as described in Paragraphs 1 through 10 of this Section III" [Par. 11(B)].

The Opinion (disbarment) of the California Supreme Court (p. 44) by taking the phrase out of context makes a parody and reverses the meaning of "caught in the system" as used by Appellant. Appellant was professing his innocence, and assailing the corruptness of Appellee. The California Supreme Court Opinion interpreted the phrase "caught in the system" to mean a confession and admission of guilt of Appellant - a shameful and intentional distortion upon which the "conviction" rests.

Especially in this "no evidence" case, the unfair and desperately strained effort to twist a protestation of innocence into an admission of guilt clearly violates **14th Amendment** due process rights.

19. Certainly a determination of guilt by California Supreme Court based upon its own

mistaken version of the facts constitutes a denial of a meaningful and fair review in the Court of Last Resort. The mistaken version concerned alleged "refusal to turn over clients' files" and "blameworthiness" for starting bankruptcy petition; the record is clear that the opposite is true. Such "determination" violates rights of due process and **14th Amendment** fair hearing of Appellant.

20. Appellee's admitting and considering as "evidence", and California Supreme Court's adoption of that position, and adoption of recommendation of disbarment based thereon, of hearsay statements of a referee in bankruptcy contained in a "Certificate of Review", violates due process, fair hearing and equal protection rights under the **6th and 14th Amendments**, because Appellee and California Supreme Court's conduct and actions deprived Appellant of right of confrontation, right of cross-examination, and rights to fair hearing

and due process.

21. The total 18 years of pendency of the quasi-criminal disciplinary proceedings, four years of which transpired due to Appellee's failure to inform Appellant of the charges against him, and 10 years expended in the conduct of the hearings, which delay was unilaterally attributable to the actions of the Appellee, coupled with the harshness of the penalty (permanent disbarment) constituted cruel and unusual punishment in deprivation of **8th and 14th Amendment** rights. Appellee's such failure (endorsed by California Supreme Court in finding and punishing by disbarment) in pre-trial delay in notifying Appellant of the fact and nature of charges against him for four years following the filing of the complaint violated **6th Amendment** right to be informed of the charges pending against him, in connection with speedy trial right, and also resulted in denial of opportunity to

introduce evidence and cross-examine witnesses because of such delay. Witnesses in civil cases (conclusions of which were used as basis for determining guilt in the disciplinary case) could not be (or have been) cross-examined by Appellant where Appellant was unaware of the charges about which to cross-examine such witnesses, where parts of records and hearsay conclusions in such civil cases formed the basis for determination of Appellant's guilt or culpability in quasi-criminal disciplinary proceedings.

Timeliness

Background: Orders of California Supreme Court:

May 27, 1987 - Malcolm Lucas, C.J. recused from further participation in subject proceeding. (Appendix 6)

August 6, 1987 Extends time for granting, denying rehearing to September 11 or the date

on which rehearing granted or denial. (Appendix 7)

Sept. 2, 1987 Denial of Rehearing, signed by LUCAS, C.J. (Appendix 8)

Feb. 18, 1988 Final, last denial of rehearing. (Appendix 3)

The September 2, 1987 Order, since signed by (recused) disqualified Justice (LUCAS) is VOID. In the February 18, 1988 Order, Arguelles, Acting C.J. attempts to make the Feb. 18 Order retroactive by two methods, both of which are unlawful and unconstitutional, making the only effective date of rehearing denial Feb. 18, 1988, the lat Order in time.

First Method: "nunc pro tunc" effective September 2, 1988. Since the Lucas Order (Sept.2) is a judicial act and error, and not "clerical", it cannot be corrected or amended by a later order. The California Supreme Court has specifically so held in Van

Tiger vs. Superior Court (1936) 7 Cal.2d 277, 60 Pac.2d 851.

"It is entirely improper...to order a nunc pro tunc entry where the result would be unconscionable", specifically where the effect would be to cut off time to appeal, as would be true in the instant case." Phillips vs. Phillips (1953) 41 Cal.2d 869, 875; 264 Pac.2d 926, cited by Witkin, California Procedure 3d, Section 63, p. 497.

Second Method: By attempting to invoke Rule 27(e) (quoted in Appendix 3), so that, in effect, the rehearing is deemed denied by "silence and expiration" on September 11, 1987. In the instant case, if Rule 27(e) were to be applied such application would be an unconstitutional one because it deprives Appellant of the vested federal right to appeal to this Court. The Feb. 18 Order (Appendix 3) applying Rule 27(e) would accomplish retroactivity (to September 11), i.e. more than the 90 days allowed for appeal

as a matter of right.

State statutes are Rules, such as Rule 27(e), should not be construed so as to preclude judicial review; the very existence of constitutionally-derived vested rights demands that the state court of last resort should not construe a statute or rule so as to prevent judicial review, in violation of procedural due process principles of the 5th and 14th Amendments, U.S. See Mathews vs. Eldridge (1976) 424 U.S. 319, 330-322.

Thus whether the First or the Second method to attain retroactivity is considered, neither is valid for reasons stated immediately above. Such result is consistent with policy of this Court. See Davis vs. Wechsler (1923) 263 U.S. 22; Cardona vs. Quinones (1916) 240 U.S. 83; U.S. vs. Gomez (1965) 70 U.S. 752.

Remaining, then is the valid portion Feb. 18, 1988 Order, as the final Order (for timeliness of this appeal) since neither

retroactive effort is cognizable or valid. The Order of Feb. 18, 1988, speaks as of its own date, and the Sept. 2 and Sept. 11 dates are nullities.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Dated: May 17, 1988.

Respectfully submitted,

Jerome B. Rosenthal
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, Pro Se

LIST OF APPENDICES

LIST OF APPENDICES

No.	Description
1	State Bar Committee "DECISION"
2	State Bar "NOTICE TO SHOW CAUSE"
3	California Supreme Court "ORDER" filed February 18, 1988 (final) denial rehearing
4	Omitted, officially reported "OPINION" of California Supreme Court July 13, 1987, Jerome B. Rosenthal vs. State Bar of California, 43 C.3d 612, 238 Cal.Rptr. 377
5	"NOTICE OF APPEAL" to Supreme Court of the United States filed in the Supreme Court of California, February 29, 1988
6	California Supreme Court Order May 27, 1987, recusing Chief Justice (Malcolm Lucas) from further participation in this proceeding
7	California Supreme Court Order August 6, 1987 extending time for granting, denying rehearing to September 11 or the date on which rehearing is granted or denied
8	California Supreme Court Order September 2, 1987, signed by (Malcolm) Lucas, C.J., denying rehearing

APPENDIX 1

State Bar Committee "DECISION"

THE STATE BAR OF CALIFORNIA

LOCAL ADMINISTRATIVE COMMITTEE NO. 53

FOR THE COUNTY OF LOS ANGELES

AND

THE STATE BAR COURT

THE STATE BAR OF CALIFORNIA

In the Matter of	)	Case No. LA2235
	)	
JEROME B. ROSENTHAL, a Member of the State Bar.	)	DECISION
	)	

On or about December 6, 1972, Respondent JEROME B. ROSENTHAL was charged and thereafter duly and regularly served with a NOTICE TO SHOW CAUSE in the above-entitled matter.

On or about March 15, 1973, Respondent appeared in this matter by filing an ANSWER TO NOTICE TO SHOW CAUSE.

On or about November 6, 1974, this matter duly and regularly came on for hearing before DONALD C. MITCHELL, Esq., ALBERT J. GALEN, Esq., and SAMUEL C. PALMER III, Esq. On or about January 30, 1981, Mr. Palmer resigned.

Messrs. Mitchell and Galen.

Numerous hearings were held and evidence, both oral and documentary, was introduced.

The Committee now, by unanimous decision, makes these:

FINDINGS OF FACT

1. During all times mentioned below, JEROME B. ROSENTHAL (Respondent) was and is now a member of the State Bar of California, licensed to practice law in the State of California.

2. From 1956 to about July 25, 1968, Respondent undertook to represent and did represent DORIS DAY MELCHER as her attorney, business manager, tax advisor and agent in various and numerous legal, accounting and business matters.

3. From 1956 until the death of DORIS DAY MELCHER's husband, MARTIN MELCHER, Respondent undertook to represent and did represent MARTIN MELCHER as his attorney, business manager and tax advisor in various

and numerous legal, accounting and business matters.

4. During the periods of time mentioned above, Respondent also undertook to represent and did represent corporations in which DORIS DAY MELCHER and MARTIN MELCHER owned an interest. Respondent represented each of those corporations as legal counsel. These corporations included ARWIN PRODUCTIONS, DAYWIN MUSIC, ARTISTS MUSIC, and MARTIN MELCHER PRODUCTIONS.

5. In 1968, MARTIN MELCHER died. Respondent then undertook to represent and did represent TERRENCE PAUL MELCHER, as personal representative of his father's probate estate. In May, 1968, TERRENCE PAUL MELCHER discharged Respondent as his attorney in those proceedings.

6. In July, 1968, DORIS DAY MELCHER discharged Respondent as her attorney and in all other capacities personal to her. Respondent was then also discharged as legal

counsel for the corporations named above.

COUNT ONE

7. During the time Respondent represented MARTIN MELCHER, DORIS DAY MELCHER, TERRENCE PAUL MELCHER, and the corporations named above, and each of them (former clients), in the capacities stated above, Respondent received, prepared, maintained and controlled numerous recOrds. These records included Contracts and other legal documents, books and records of account, and various other papers and writings important to the personal and business affairs of Respondent's former clients. These records were the property of one or more of Respondent's former clients.

8. Following the termination of Respondent's relationship as attorney for his former clients, numerous requeSts and demands were made by and on behalf of them, and each of them, for (a) the return of their records, and (b) an accounting of their affairs during

the times Respondent had represented them in his various capacities.

9. Respondent refused to return the records. Respondent refused to render any accountings. Such refusals were unreasonable and without justification. Such refusal.s were intended to harass Respondent's former clients and delay and frustrate their ability to discover the nature and status of their business and legal affairs during the time they were subject to Respondent' s control.

10. Respondent's conduct caused DORIS DAY MELCHER to apply to the court for relief. The court then appointed a receiver so that the records could be examined by her or on her behalf. As a result of those proceedings, DORIS DAY MELCHER incurred unnecessary legal and other expenses and costs.

COUNT TWO

11. On or about August 8, 1968, Respondent caused a petition to be filed to remove TERRENCE PAUL MELCHER as personal

representative of his father's estate. Although that petition was denied, it was supported by law and some evidence and hence not filed for the sole purpose of harassing Respondent's former clients.

COUNT THREE

12. Following the death of MARTIN MELCHER, Respondent claimed ownership interests, profit shares, and other proprietary rights in various business ventures of MARTIN MELCHER and DORIS DAY MELCHER (his clients). These ventures had been formed, promoted or handled by Respondent $s his clients' legal and business advisor. Notwithstanding these claims, Respondent refused to furnish to or allow his clients, their successors in interest or representatives to have access to their own files and records which pertained to those ventures and which Respondent had kept and maintained for their benefit.

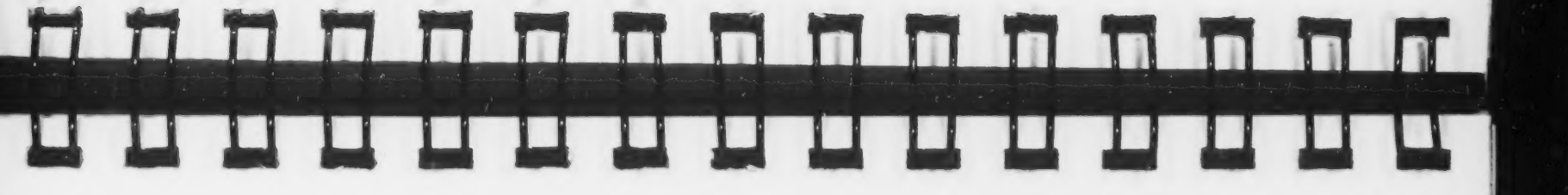
13. Respondent's refusal to furnish

those files or records to or to allow his clients, their successors in interest or representatives to have access to them was unreasonable, without justification, intended to harass and delay them in their effort to evaluate Respondent's claims, and to prejudice their defense of lawsuits Respondent commenced against them.

COUNT FOUR

14. In or about November, 1968, Respondent caused a petition to be filed in the Dallas Division of the United States District Court for the Northern District of Texas. It was entitled IN THE MATTER OF DALLAS CABANA, INC., BANKRUPT, and numbered BK3-1210 (the Dallas case).

15. Respondent caused that petition to be filed without requisite statements and schedules. Notwithstanding a court order to file such statement with schedules by December 5, 1968, Respondent failed to have them filed until April 1, 1969.

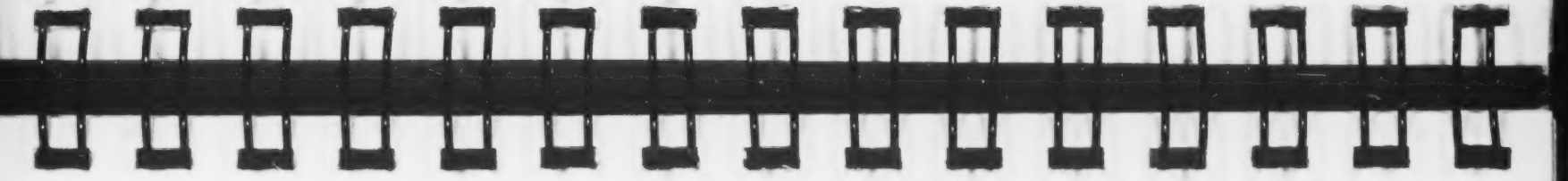


16. On or about February 11, 1969, the court in that case ordered Respondent to file a plan of arrangement by March 3, 1969. Respondent requested and obtained an extension of time within which to file such plan to May 1, 1969. Such continuance delayed all other proceedings. The plan of arrangement which Respondent subsequently filed was a sham and presented in bad faith.

17. Such conduct was committed or permitted by Respondent for the purpose of delaying the disposition of the Dallas case on its merits and was an obstruction to the orderly administration of justice in those proceedings.

COUNT FIVE

18. On or about March 3, 1969, DORIS DAY MELCHER and TERRENCE PAUL MELCHER submitted a plan of arrangement in the Dallas case (MELCHER plan). A majority of the bankrupt's creditors, in number and amount, accepted the MELCHER plan. Those creditors represented



$1,872,001.00 of debt. Creditors opposing the MELCHER plan represented only $591,302.00 of debt, all but $33,040.00 of which was being claimed by CABANA MANAGEMENT, INC., a corporation, and ROSENTHAL. AND GREEN, a law partnership. Both CABANA MANAGEMENT, INC. and ROSENTHAL AND GREEN Were the alter ego of and dominated and controlled by Respondent.

19. Respondent then caused CABANA MANAGEMENT, INC. and ROSENTHAL AND GREEN to submit false and grossly exaggerated amendments to their claims in that case. These amendments increased the debt which they represented and claimed to $2,291,302.00.

20. Respondent knew that such amendments were false, a sham, presented in bad faith, grossly exaggerated, and made for the purpose of depriving the MELCHER plan of majority approval. Those amendments were an obstruction of justice in those proceedings.

COUNT SIX

21. Commencing in March, 1969,

Respondent made misrepresentations to the court in the Dallas case. Those misrepresentations included these:

21.1 Respondent represented that the debtor owned the DALLAS CABANA HOTEL. When a bona fide offer to purchase that asset was received, however, Respondent then misrepresented that the debtor did not own it but that it was owned by a joint venture.

21.2 On February 27, March 17, April 28, April 30, May 16 and in June, 1969, Respondent misrepresented the value of the DALLAS CABANA HOTEL.

21.3 On March 17, May 16 and in June, 1969, Respondent misrepresented that a purchaser was ready, willing and able to and had offered to pay in excess of $4,500,000.00 for the DALLAS CABANA HOTEL. 21.4 On February 17, 1969, Respondent opposed the issuance of an order directing filing of plans of arrangement. That opposition was supported by the misrepresentation that Respondent had been

denied access to DALLAS CABANA HOTEL books and records.

21.5 On May 12, 1969, Respondent opposed the issuance of an order quieting title to the DALLAS CABANA HOTEL. That opposition was supported by misrepresentations that:

(a) His former clients had illegally seized records containing information essential to Respondent's preparation for the hearing on that order;

(b) The Seizure of said records was then the subject of an appeal in the California state courts and hence the court should take no action on the quiet title order until that appeal had been decided; and

(c) That the seized records were stored 10 to 15 miles from Respondent's office.

21.6 Respondent filed objections to interrogatories of the trustee in bankruptcy. Those objections were supported with the misrepresentation that a receivership established by a California court had deprived

Respondent of access to records necessary to allow Respondent to properly answer such interrogatories.

22. Each of the above misrepresentations were made intentionally, made with knowledge of their falsity, made for the purpose of delay, made in bad faith, and were an obstruction of justice in those proceedings.

COUNT SEVEN

23. Prior to commencement of the trial in the Dallas case, Respondent engaged in further conduct, the purpose of which was to delay commencement of that trial, further harass his former clients, and obstruct the orderly administration of justice in those proceedings. Such conduct included this:

23.1 In November, 1969 (10 days before commencement of the trial), Respondent filed a motion to disqualify counsel for the trustee. Respondent knew that counsel for the trustee had spent months preparing the matter for trial, and that the court had denied

substantially the same motion approximately five months earlier. Such motion was without merit and known by Respondent to be without merit.

23.2 In December, 1969 (6 days prior to commencement of the trial), Respondent filed a petition to transfer the hearing to California. Such motion was without merit and known by Respondent to be without merit.

23.3 Respondent refused, prior to trial, to sign his deposition and caused those under his control and domination to dc likewise.

23.4 Respondent refused, prior to trial, to correct deficiencies in claims which Respondent had submitted and caused Others under his control and domination to do likewise, notwithstanding representations made to the court at a pre-trial conference hearing that such deficiencies would be corrected prior to trial.

COUNT EIGHT

24. Commencing in December, 1969 and

during the trial of the Dallas case, Respondent engaged in further conduct, the purpose of which was to delay the progress of the trial, harass his former clients, and obstruct the orderly administration of justice in those proceedings. Such conduct included this:

24.1 Engaged in obstinate, insulting and defiant conduct toward the court and opposing counsel;

24.2 Engaged in evasive testimony;

24.3 Offered (or caused to be offered by his counsel) specious objections to questions asked by opposing counsel in cross-examination of Respondent.

COUNT NINE

25. During the trial of the Dallas case, Respondent testified under oath on more than one occasion that his law firm had not received payment foe legal services rendered to the DALLAS CABANA HOTEL. SUch testimony was false and known by Respondent to be false.

In truth and in fact, Respondent's law firm had received $20,000.00 for services rendered to the DALLAS CABANA HOTEL.

COUNT TEN

26. In 1963, Respondent caused CABANA MANAGEMENT, INC. (CABANA) to be created at a time when he was employed to represent various legal and business interests of MARTIN MELCHER and DORIS DAY MELCHER. The MELCHERs owned controlling stock or beneficial interests in the DALLAS CABANA HOTEL and the PALO ALTO CABANA HOTEL. CABANA was intended to service and manage the Dallas and Palo Alto hotels.

27. From its creation in 1963 to and including May, 1970, Respondent (or Respondent's law partnerships) directed, dominated and controlled CABANA. CABANA was Respondent's alter %go and dominated and controlled by Respondent. CABANA's interests were adverse to the interests of Respondent's clients, the MELCHERS and the Dallas and Palo Alto hotels. CABANA was a fraudulent device

created and used for the purpose of claiming money from the management and/or operation of the Dallas and Palo Alto hotels. Such claims were, for the most part, contrived, a sham, fraudulent, exaggerated and, in some instances, duplicative of claims made by Respondent's law firm for the same services.

28. Respondent represented these conflicting interests without obtaining the consent of all parties concerned.

29. RespOndent intentionally caused CABANA to overstate expenses allegedly incurred for the benefit of the Dallas and Palo Alto hotels.

30. Respondent intentionally caused CABANA to understate payments made by the Dallas cabana and Palo Alto hotels on account of such expenses.

COUNT ELEVEN

31. In 1969 or 1970, acting as president of DOANBUY LEASE AND CO, INC., a corporation, Respondent caused four actions to be filed in

Lea County, New Mexico, against some of Respondent'S former clients and others. It was necessary for the defendants to obtain a court order requiring Respondent to appear and be deposed in Roswell, New Mexico. Respondent appeared pursuant to such order but engaged in conduct that was so evasive, hostile, insulting and contrary to good order that it amounted to a refusal to be deposed. It was then necessary for the defendants to obtain a court order for relief because of such conduct.

COUNT TWELVE

32. In April, 1968, while Respondent was employed as legal counsel for TERRENCE PAUL MELCHER in his capacity as administrator of the Estate of MARTIN MELCHER, Deceased, Respondent advised his client to authorize certain payments and execute certain documents on behalf of that estate. Such payments included the payment of $60,000.00 to Republic Supply, $17,000.00 to Arkansas-Louisiana

Producing Company, and the execution of a note in the sum of $136,000.00 payable to Arwin Productions, Inc. Respondent obtained personal benefit from each of those payments and from that note. Respondent did not disclose that fact to his client but, on the contrary, led his client to believe that such transactions were for the sole benefit of the estate.

COUNT THIRTEEN

33. In addition to the actions and proceedings mentioned above, Respondent caused numerous lawsuits to be filed for the purpose of harassing his former clients. Those lawsuits included these:

Cabana Management, Inc. v. Terrence P. Melcher, etc., et al., Los Angeles County Superior Court Case No. 942239;

Rosenthal S. Green, etc. v. Terrence P. Melcher, etc., et al., Los Angeles County superior Court Case No. 952949;

Jerome B. Rosenthal, et al. v. Terrence P. Melcher, etc., et al., Los Angeles County Superior Court Case No. 952950;

Jerome B. Rosenthal, et al. v. Terrence P. Melcher, etc., et al., Los Angeles

County Superior Court Case No. 952951;

Rosenthal & Green, etc. v. Terrence P. Melcher, etc., et al., Los Angeles County Superior Court Case No. 952953;

Rosenthal L Green, etc., et al. v. Terrence P. Melcher, etc., et al., Los Angeles County Superior Court Case No. 952954;

Jerome B. Rosenthal v. Doris Day Melcher, etc., et al., Los Angeles County Superior Court Case No. 958726.

COUNT FOURTEEN

34. In or about March, 1953, Respondent negotiated an ostensible purchase of Federal Land Bank Bonds for MARTIN MELCHER and DORIS DAY MELCHER (the MELCHERS). These bonds had a face value of $3 million. They were purchased on credit by a promissory note bearing 4-1/4% interest issued by the MELCHERS.

35. Although purporting to represent the MELCHERS in this transaction, Respondent secretly and without their knowledge or consent, also negotiated for his own account the purchase of Fl million worth of the same kind of bonds. Respondent's purported purchase was also on credit, but he negotiated

his promissory note at an interest rate of only 3-1/28. The 3/4% differential in interest caused the MELCHERS to have an out-of-pocket expense in excess of 4008 more than Respondent's out-of-pocket expense during the time payments were made on those notes.

CONCLUSIONS OF LAW[1]

36. By reason of the facts stated above, Respondent:

(a) Wilfully violated his oath as an attorney as set forth in Section 6067 of the Business G Professions Code in that he failed to faithfully discharge his duties as an attorney at law to the best of his knowledge and ability.

(b) wilfully failed to discharge his duties as an attorney in violation of Section 6068(c) of the Business L Professions Code in that he maintained proceedings known by him to

---

[1]All references to "client" or "clients" below refer to MARTIN MELCHER, DORIS DAY MELCHER, TERRENCE PAUL MELCHER, and the corporations referred to in Paragraph 7 above, and each of them.

be illegal abuses of legal processes or unjust.

(c) Wilfully failed to discharge his duties as an attorney in violation of Section 6068(d) of the Business s Professions Code in that he employed, for the purpose of maintaining causes confided to him, means not consistent with the truth and sought to mislead the judge or judicial officer by artifice or false statements of fact.

(d) Wilfully failed to discharge his duties as an attorney in violation of Section 6068(g) of the Business s Professions Code in that he encouraged the commencement and maintenance of actions and proceedings with corrupt motive of passion or interest.

(e) Violated Section 6106 of the Business s Professions Code in that he committed acts involving moral turpitude or dishonesty in the course of his relations as an attorney and otherwise.

(f) Violated Section 6077 of the Business

& Professions Code in that he wilfully violated the following Rules of Professional Conduct of the State Bar of California[2]:

(i) Rule 4 in that he acquired interests adverse to his clients;

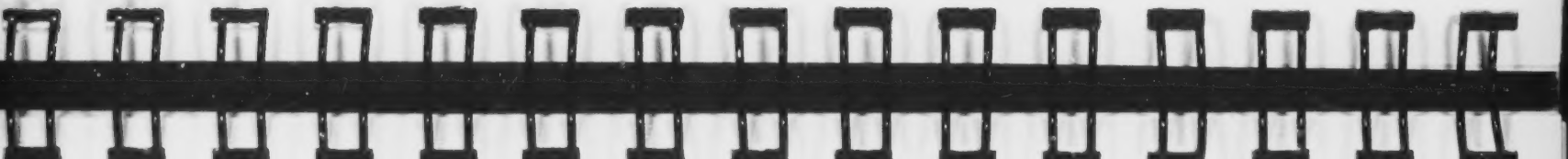
(ii) Rule 5 in that he accepted employment adverse to his clients without the consent of his clients relating to matters in reference to which he obtained confidential information by reason of or in the course of his employment by such clients;

(iii) Rule 6 in that he accepted professional employment without first disclosing his relation, if any, with the adverse party, and his interest in the subject matter of the employment;

(iv) Rule 7 in that he represented conflicting interests without obtaining the

---

[2]References to Rules of Professional Conduct are to those in effect at the time of the violations. The revised and current Rules are 2-110(A), 4-101, 5-101, 5-102(A) and 5-102(B).



consent of all parties concerned;

(v) Rule 13 in that he accepted employment to prosecute and did prosecute cases solely for the purpose of harassing his clients and delaying them in the prosecution of their claims against him.

(g) Violated his oath and failed to discharge other duties and obligations not specifically mentioned in the Rules of Professional Conduct but which fall within the purview of Sections 6067, 6068 and 6103 of the Business & Professions Code. Such other duties and obligations were of common knowledge and usage within the legal profession in the State of California at the time of their violation and were then commonly observed and performed by members of the Bar in good standing and repute. Respondent wilfully violated his oath and failed to discharge such other duties and obligations in that he:

(i) Failed to perform legal services

competently for and on behalf of his clients and with reckless disregard for their welfare;

(ii) Refused to render appropriate accounts to his clients regarding funds, securities and other property of his clients held by him or subject to his control;

(iii) Refused to promptly pay or deliver to his clients the funds, books, records and other properties in his possession or subject to his control which his clients were entitled to receive.

MATTERS IN MITIGATION OR AGGRAVATION

37. By letter dated October 30, 1985, the Committee advised Respondent and counsel for the State Bar of a preliminary finding of culpability and invited the submission of evidence in mitigation or aggravation to be submitted prior to finalization of the Committee's decision and not later than November 22, 1985. No response was forthcoming from counsel for the State Bar. Respondent responded by "letter" dated

November 15. He there requested (a) a new decision, (b) specific findings as defined by him, and (c) a postponement of the November 22 date. Except to the extent that this decision and the findings recited above comply with Respondent's request, his requests for a new decision and findings of fact in the manner and form demanded by him are denied. With respect to Respondent's request for postponement, it is denied.

38. In addition to the matters alluded to above, the evidence also permits the finding that Respondent committed other offenses not specified in the NOTICE TO SHOW CAUSE. Such offenses include Respondent's gross negligence in handling other affairs of his clients, engaging in kickbacks, commingling client funds, over-reaching in matters pertaining to fees, misuse of client funds in other business and professional matters, and participation in other fraudulent and/or sham transactions. It also appears

that Respondent prosecuted appeals solely for the purpose of delay and not in good faith.[3]

39. Respondent's conduct and attitude throughout these proceedings also support the disposition recommended below. Respondent's testimony before and representations made to the Committee were less than candid. He interposed every conceivable motion, objection and/or other device or artifice throughout these proceedings, most of which appeared to be made for the purpose of delay and to frustrate the orderly resolution of this matter on its merits. This pattern of conduct followed the same modus employed by him in the Samet v. Day litigation in California the bankruptcy proceedings in Texas, and the oil litigation in New Mexico.[4] The last example

---

[3]See, for example, Doanbuy Lease & Co. Inc. v. Melcher (1971), 83 N.M. 82, 448 P2d 339, Exhibit 10.

[4]Respondent's conduct was criticized by the courts in Texas in Dallas Cabana v. Collier, 469 F.2d 606 (5th Cir. 1972), and in New Mexico in Doanbuy Lease & Co. Inc. v.

of it in these proceedings can be seen upon examination of his "letter" to the Committee referred to above and dated November 15, 1985.

RECOMMENDED DISCIPLINE

40. Pursuant to Sections 6078, 6100, 6103 and 6106 of the Business S Professions Code, it is recommended that Respondent be disbarred from the practice of law.

DATED: December 17, 1985.

(S) DONALD C. MITCHELL
DONALD C. MITCHELL

(S) ALBERT J. GALEN
ALBERT J. GALEN

Melcher, supra. See Exhibits 10, 119 and 149.

APPENDIX 2

State Bar "NOTICE TO SHOW CAUSE"

THE STATE BAR OF CALIFORNIA

LOCAL ADMINISTRATIVE COMMITTEE NO. TWO

FOR THE COUNTY OF LOS ANGELES

In the Matter of	)	Case No. LA 2235
	)	
JEROME B. ROSENTHAL, Member of the State Bar.	)	NOTICE TO SHOW CAUSE
	)	

TO: JEROME B. ROSENTHAL

It appearing that you were admitted to the practice of law in the State of California on June 11, 1946 and that you are and at all times herein mentioned have been an attorney and counselor at law and a member of the State Bar of California; and

Preliminary investigation having been made pursuant to the provisions of Rule 21 of the Rules of Procedure of the State Bar of California, during the course of which preliminary investigation you were given an opportunity to be heard, and this Committee, as a result of said preliminary investigation,

should be instituted and a hearing held in accordance with the provisions of Rule 2 of the Rules of Procedure of the state Bar of California;

NOW, THEREFORE, you are hereby notified to appear in person or by counsel or both, before Local Administrative Committee No. Fifty-Three for the county of Los Angeles at 1230 West Third Street, in the City of Los Angeles, in said State, on Thursday March 15, 1973 at the hour of 10:00 a.m. thereof, then and there to show cause why you should not be disciplined for professional misconduct, to wit:

Violating your oath and duties as an attorney and counselor at law within the meaning of Section 6103 of the Business and Professions Code of the State of California as the same are prescribed by Sections 6067 and 6068 of said Code; violating Section 6128 of the Business and Professions code of the State of California; the commission of acts

involving moral turpitude dishonesty or corruption within the meaning of Section 6106 of the Business and Professions Code of the State of California and willfully violating Rules 4, /, 9, and 13 of the Rules u[Professional Conduct of the State Bar of California; and in particular as follows:

COUNT ONE

I

From in or before the year 1956 until approximately July 25, 1968, MARTIN MELCHER, now deceased, and DORIS DAY MELCHER, wife and widow of MARTIN M. MELCHER, employed you to represent them in various legal, financial, accounting and business matters. From on or about April 24, 1968 and for approximately one month thereafter, you were attorney for MARTIN M. MELCHER's son, TERRENCE PAUL MELCHER, in his capacity as special administrator and administrator of his father's Estate. From in or before the year 1963 until or or about July 25, 1968, you were legal, business, and

financial advisor to various corporations owned, directly or indirectly, by DORIS DAY MELCHER and by MARTIN M. MELCHER or his Estate. These corporations included ARWIN PRODUCTIONS, DAYWIN MUSIC, ARTIST'S MUSIC, and MARTIN MELCHER PRODUCTIONS. In connection with said employments certain records and documents belonging to the respective Clients mentioned above came into your control or custody.

II

On or about July 25, 1968, DORIS DAY MELCHER discharged you from employment as her attorney and as attorney for the corporations to which reference has been made. In late May of 1968, TERRENCE PAUL MELCHER discharged you as attorney for him as administrator.

III

Commencing on or about the dates on which you were discharged by said clients, they made numerous requests that you return to them books, records and files which belonged to

them. It was also requested on numerous occasions that you make an accounting of the affairs of your former clients involving the handling of property whose value exceeds five million dollars.

IV

You unreasonably delayed returning any of the Melcher's property and you have refused to return at all a substantial portion of the property belonging to your former clients. You refused to make an accounting for the affairs of your former clients unless they re-employed you to act as attorney for MARTIN M. MELCHER's Estate at least for the period Of time during which an accounting was being prepared. When TERRENCE PAUL MELCHER refused to re-employ you as attorney for the Estate, you refused to make an accounting.

V

In order to gain access to her own property which had been withheld by you, it was necessary for DORIS DAY MELCHER to have a

receiver appointed. MRS. MELCHER has had to expend in excess of $50,000.00 in receiver's fees in order to examine her books, records and files which are or were in your possession. This financial expense is in addition to the inconvenience and effort required to make what would be otherwise routine reference to business records.

COUNT TWO

On or about August 8, 1968, you caused to be filed in Los Angeles County Superior Court, Case Number P534760, ESTATE OF MELCHER, a petition to remove TERRENCE PAUL MELCHER as administrator of his father's estate. Said petition was without substantial basis in law or fact and filed for the purpose of harassing your former clients. Although the petition was denied by the court, the Estate of MARTIN M. MELCHER was put to substantial expense in defending against the petition.

COUNT THREE

I

You have claimed ownership interest, profit shares, and other proprietary rights in various business ventures of MARTIN and DORIS MELCHER. In Spite Of these claims, you have refused to supply pertinent files and records to MRS. MELCHER's attorneys and accountants in order that your claims could be substantiated.

II

Your refusal to furnish these files and records or to allow access. to them prevented your former clients from ascertaining their rights and liabilities in connection with your claims.

III

Creditors' claims against the Estate of MARTIN MELCHER were filed by you or by the following-named entities in which you then had an interest: CABANA MANAGEMENT, INC.; ROSENTHAL & GREEN; TOMMY E. ATKINS PRODUCING CO., Ltd.; TOM ATKINS LINE CO., Ltd., dba

MELCHER-ATKINS OIL CO., Ltd. and as MOAR LINE CO. Ltd.

IV

Your refusal to allow your former clients to have access to their records and your refusal to account for your handling of their affairs has substantially prejudiced their ability to assess the validity of the above-mentioned claims, as well as having prejudiced their ability to defend against the various lawsuits you have caused to be filed against them.

COUNT FOUR

I

On November 25, 1968, in the Dallas Division of the United States District Court for the Northern District of Texas, you caused to be filed a petition under Chapter XI of the federal bankruptcy laws. The petition was entitled IN THE MATTER OF DALLAS CABANA, INC., BANKRUPT and was case number BK 3-1210 in Bankruptcy, hereinafter called "the Dallas

Case".

II

You caused said petition to be filed without the requisite statements and schedules. In spite of an order of the court to file such statements and schedules by December 5, 1968, you failed to have such filing performed until April 1, 1969.

III

On February 11, 1969, the court ordered you to file by March 3, 1969 a plan of arrangement in the Dallas Case. You requested and obtained an extension of time until May 1, 1969 in which to file said plan, the continuance delaying all other proceedings. The plan of arrangement which you subsequently filed was a sham, was filed in bad faith, and was interposed solely for the purpose of delaying the court's disposition of the Dallas Case on its merits.

COUNT FIVE

I

The allegations of Paragraph I of Count Four of this Notice are realleged and incorporated by this reference as if fully set forth herein.

II

On or about March 3, 1969 a plan of arrangement for the bankrupt in the Dallas Case was submitted by DORIS DAY MELCHER and TERRENCE PAUL MELCHER. The MELCHERS had also filed a petition in relation to the bankrupt in the Dallas Case and their petition was consolidated with yours. A majority of the bankrupt's creditors, in number and amount, had accepted the plan submitted by the MELCHERS. The amount of debt represented by those accepting the MELCHER plan was $1,872,001. The amount of debt represented by those opposing the MELCHER plan was $591,302.00, all but $33,040.00 of that amount being claimed by CABANA MANAGEMENT, INC., a

California Corporation controlled and dominated by you, and by ROSENTHAL & GREEN, a law partnership which you also controlled and dominated. In order to prevent the MELCHER plan from being confirmed, you caused CABANA MANAGEMENT, INC. and ROSENTHAL & GREEN to submit false and grossly exaggerated amendments to their claims bringing their total claims to $2,291,302.00, depriving the MELCHER plan of a majority approval as to amount of claims.

COUNT SIX

I

The allegations of Paragraph I of Court Four of this Notice are realleged and incorporated by this reference as if fully set forth herein.

II

Over a period of several months commencing in March, 1969, you obstructed the proceedings in the Dallas Case by various misrepresentations made to the court in that case. These

misrepresentations included the following:

(1.) You represented to the court that the debtor owned the Dallas Cabana Hotel. When a bona fide offer to purchase the hotel was received, you then intentionally misrepresented to the court that the debtor did not own the hotel but that instead it was owned by a joint venture.

(2.) On February 27, 1969, March 17, 1969, April 28, 1969, April 30, 1969, May 169 1969 and in June 1969, you intentionally misrepresented to the court the value of the Dallas Cabana Hotel.

(3.) on.March 17, 1969, May 16, 1969, and in June 1969, you represented to the court and to other parties that purchasers were ready to pay in excess of $4,500,000.00 for the Dallas Cabana Hotel. When such representations were made you knew them to be sham and you deliberately mislead the court in an

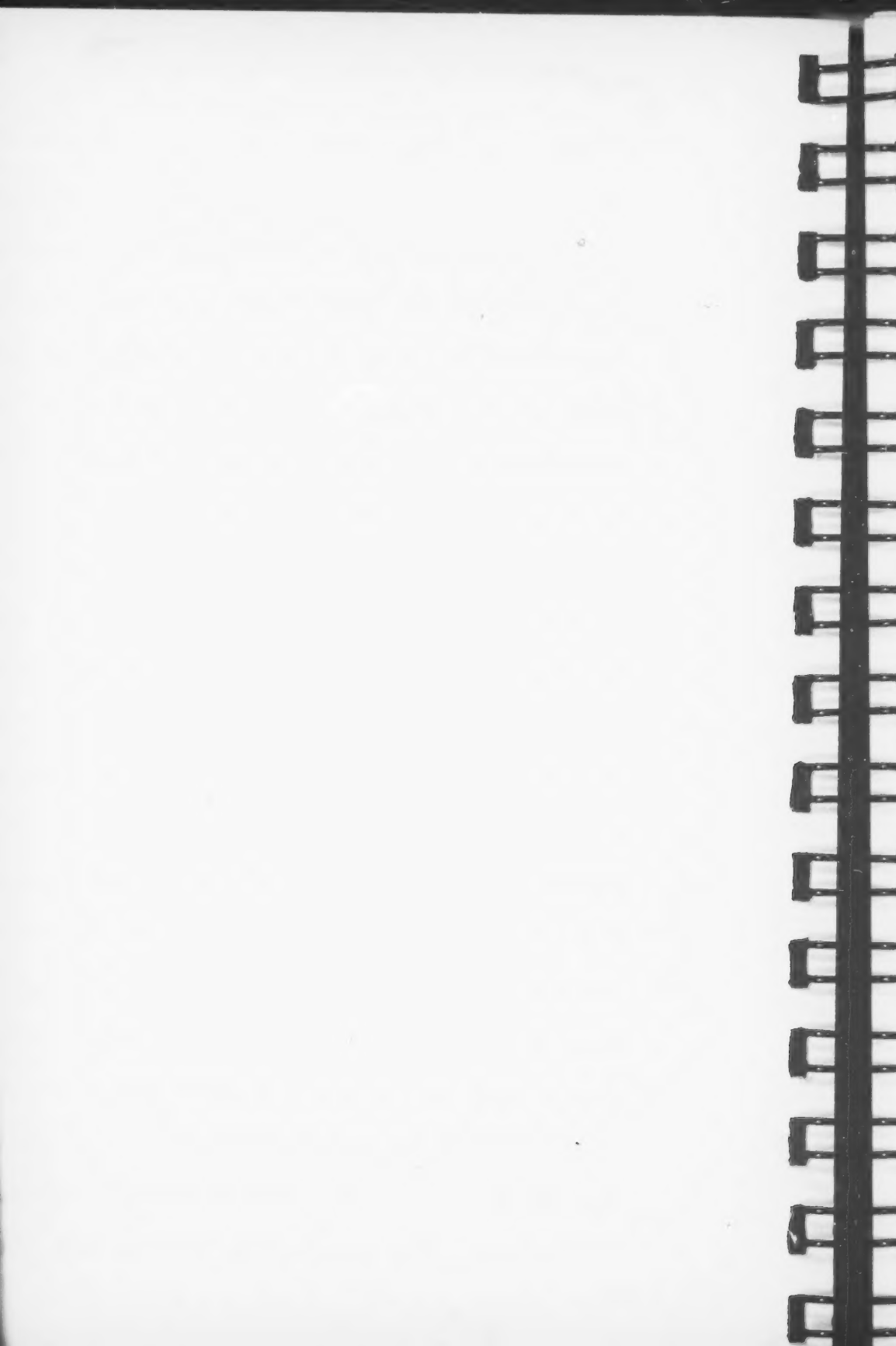
attempt to prevent court approval of the only bona fide offer to purchase the hotel.

(4.) On February 17, 1969 you opposed the issuance by the court of an order directing filing of plans of arrangement. Your opposition was supported by your representation to the court that you had been denied access to the books and records of the Dallas Cabana Hotel. When said representation was made, you knew it was false.

(5.) On May 12, 1969, you opposed the issuance of an order quieting title to the Dallas Cabana Hotel on the ground that the MELCHERS had illegally seized your law firm's records containing information essential to your preparation for the hearing on the order. You represented further that the seizure of said records was then the subject of an appeal in the California State Courts and

asked that the court take no action on the quiet title order until said appeal had been decided. You also represented to the court at that time that the seized records were stored ten to fifteen miles from your office. All of the foregoing representations were false and were known by you to be false when made.

(6.) On December 1, 1969, you filed objections to the interrogatories of the trustee in bankruptcy on the ground that a receivership established by the California State Courts deprived you of access to the records which were necessary tv allow you to properly answer the interrogatories. Because of the imminent commencement of the trial on the merits of the petition, there was no time for a hearing on your objections, and the trustee had to proceed to trial without any answers to the interrogatories served upon you. The professed ground for your



objection was a sham and was false and, when offered, was known by you to be false. The objections were made to delay and to thwart discovery sought by the trustee. On November 11, 1969, you failed to appear for your deposition which you had agreed to attend. The trustee was required to obtain a court order to compel you to return to the deposition.

COUNT SEVEN

I

The allegations of Paragraph I of Count Four of this Notice are realleged and incorporated by this reference as if fully set forth herein.

II

Prior to commencement of trial in the Dallas Case you engaged in certain conduct, the only purpose of which was to delay commencement of the trial in the Dallas Case. Included in such conduct was the following:

(1.) On November 28, 1969, ten days before commencement of the trial you filed a motion to disqualify the counsel for the trustee. You made the motion knowing that your motion had no merit, knowing that said counsel had spent months preparing the matter for trial, and knowing that the court had denied substantially the same motion five months earlier. Your motion to disqualify counsel was offered for the purpose of delaying the trial of the Dallas Case for the months it would taLe new counsel to prepare for trial.

(2.) On December 2, 1969, six days prior to trial in the Dallas Case, you engaged in conduct, the only purpose of which was to delay the trial. You filed a petition to transfer the hearing to California. There was no meritorious grounds for such a transfer. You refused to sign your deposition and caused your law partner

and your employee, one HARRISON, to likewise refuse to sign their depositions.

(3.) Until trial Commenced on December 8, 1969, you had not yet corrected the deficiencies in the claims submitted by you and by others controlled or directed by you, although you had represented to the court at a pretrial conference that such deficiencies would be corrected prior to trial.

COUNT EIGHT

I

The allegations of Paragraph I of Count Four of this Notice ire realleged and incorporated by this reference as if full set forth herein.

II

During the course of the trial of the Dallas Case, lasting more than two weeks, you obstructed the proceedings by obstinate, insulting and defiant conduct toward the court

and opposing counsel, by evasions in your testimony, by attempting to prevent cross-examination of yourself, and by offering or causing to be offered by your counsel, specious objections to questions asked by opposing counsel in their cross-examination of you.

COUNT NINE

I

The allegations of Paragraph I of Count Four of this Motion are realleged and incorporated by this reference as if fully set forth herein.

II

On more than one occasion during trial of the Dallas Case you testified under oath that your law firm had not received any payments for legal services rendered to the Dallas Cabana
Hotel. In truth and in fact, as was known to you when your testimony was given, your law firm had received $20,000.00 from the Dallas

Cabana Hotel for such legal services.

COUNT TEN

I

You caused CABANA MANAGEMENT, INC. to be created in 1967 at a time when you were employed to represent the various interests of MARTIN MELCHER and DORIS DAY MELCHER. The MELCHERS owned the controlling stock or beneficial interest in the Dallas Cabana Hotel and the Palo Alto Cabana Hotel,

II

The CABANA MANAGEMENT, INC. Commenced active functioning in June, 1965. At all times since its creation, to and including May 7, 1970, you or your law partnership directed and controlled CABANA MANAGEMENT, INC, The interests of CABANA MANAGEMENT, INC. were adverse to the interests of the MELCHER in that CABANA MANAGEMENT, INC. was no more than a fraudulent device by means of which you intended to claim moneys from the Dallas Cabana Hotel and from the Palo Alto Cabana

Hotel. Such claims were contrived for the most part, and even where some justification existed for the claims, they were largely duplicative of separate claims submitted by your law firm for the same services.

III

In relation to said claims, you deliberately and intentionally overstated expenses allegedly incurred on behalf of the hotel; and you deliberately and intentionally understated payments made to you by the hotels on account of such expenses. In truth and fact and as was known by you, the hotels had actually overpaid you on this account by some $7,092.00.

COUNT ELEVEN

In 1969 or 1970, acting as president of DOANBUY LEASE AND CO., INC., a California Corporation, you caused to be filed in the Lea County, New Mexico District Court four actions naming TERRENCE MELCHER, the estate of MARTIN MELCHER, DORIS DAY MELCHER and others as

defendants. In connection with said actions the defendants obtained an order requiring you to appear and be deposed for two days in Roswell, New Mexico. You appeared at such deposition but your conduct was so evasive, hostile, insulting and contrary to good order without cause therefor that it amounted to a refusal to be deposed.

COUNT TWELVE

In April, 1968, while you were employed as attorney for TERRENCE PAUL MELCHER in his capacity as administrator for the estate of MARTIN M. MELCHER, you advised him to authorize certain payments and execute certain documents on behalf of said estate. Included was a payment to REPUBLIC SUPPLY in the amount of $60,000.00, a payment to Arkansas-Louisiana Producing Company in the amount of $17,000.00, and a note payable to Arwin Productions, Inc. in the amount of $136,000.00. Although you obtained personal benefits from said payments and said not you

did not inform TERRENCE MELCHER of this fact, instead you advised TERRENCE MELCHER that said transactions were for the benefit of the MELCHER Estate.

COUNT THIRTEEN

In addition to the above-mentioned actions, you have caused numerous lawsuits to be filed for the sole purpose of harassing your former clients. Included in such lawsuits are the following:

(1.) Cabana Management, Inc. v. Terrence P. Melcher, etc. et al., Los Angeles County Superior Court Case No. 942239;

(2.) Rosenthal & Green, etc. v. Terrence P. Melcher, etc. et al., Los Angeles County Superior Court Case No. 952949;

(3.) Jerome B. Rosenthal, et al. v. Terrence P. Melcher, etc. et al., Los Angeles County Superior Court Case No. 952950;

(4.) Jerome B. Rosenthal, et al. v. Terrence P. Melcher, etc. et al., Los Angeles County Superior Court Case No. 952951;

(5.) Rosenthal & Green, etc. v. Terrence P. Melcher, etc. et al., Los Angeles County Superior Court Case No. 952953;

(6.) Rosenthal & Green, etc. v. Terrence P. Melcher, etc. et al., Los Angeles

County Superior Court Case No. 952954;

(7.) Jerome B. Rosenthal v. Doris Day Melcher, etc., et al., Los Angeles County Superior Court Case No. 958726.

COUNT FOURTEEN

I

In or around March of 1953, you negotiated for Mr. and Mrs. Martin Melcher an ostensible purchase of Federal Land Bank bonds with a face value of $3,000,000.00. The bonds were purchased on credit, with the Melchers delivering to the brokerage firm's agent a promissory note bearing 4 1/4 percent interest.

While purporting to represent the Melchers in this transaction, you secretly, and without the knowledge or consent of the Melchers, negotiated for your own account the purchase of $1,000,000.00 worth of the same kind of bonds. Your purported purchase was also on credit, however your promissory note bore an interest rate of only 3 1/2 percent. The 3/4 percent difference in interest rates

resulted in the Melchers having an actual out-of-pocket expense in excess of 400 percent more than your out-of-pocket expense during the five years in which payments were made on the notes.

WITHIN TEN (10) days after the service of this notice you shall serve a written answer as provided for by Rules 28, 31, 32 and 33 of the Rules of Procedure.

By order of Local Administrative Committee No. Two for the County of Los Angeles, made on October 31, 1972.

DATED: Dcember 6, 1972

(S) RICHARD M. DARBY
RICHARD M. DARBY

(S) SANFORD M. EHRMANN
SANFORD M. EHRMANN

(S) RICHARD R. TERZIAN
RICHARD R. TERZIAN

MEMBERS OF SAID COMMITTEE

APPENDIX 3

California Supreme Court "ORDER"
filed February 18, 1988 (final)
denial rehearing

SUPREME COURT

F I L E D

FEB 18 1988

Laurence P. Gill, Clerk

Deputy

No. L.A. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL, Petitioner

v.

STATE BAR OF CALIFORNIA, Respondent

On July 13, 1987, this court issued its opinion in this case disbarring Petitioner and ordering that his name be stricken from the roll of attorneys effective thirty days after the filing of the opinion. On August 6, 1987, the court, in an order signed by Acting Chief Justice Panelli, granted an extension of time to September 11, 1987, within which to hear petitioner's petition for rehearing. (Cal. Rules of Court, Rule 24(a).) On September 2, 1987, the court, in an order signed by Chief

Justice Lucas, issued its order denying the petition for rehearing; no votes to rehear the matter were cast. Chief Justice Lucas previously recused himself in this matter at petitioner's request. In order to assure that there is no question regarding the propriety of that order, this order denying the petition for rehearing is issued to be effective nunc pro tunc as of September 2, 1987. In any event, the matter became final as of September 11, 1987, pursuant to California Rules of Court, Rule 27 (e), which states that "If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied . . . ." The court's jurisdiction in which to act on the petition for rehearing elapsed as of that date pursuant to the extension of time granted on August 6, 1987.

Our order disbarring petitioner thirty days after the filing of our opinion was never stayed. In any event, any delay in the effective date of disbarment due to the

court's retention of jurisdiction in order to consider the petition for rehearing ended on September 11, 1987, the last day to which time was extended in order for the court to consider the request for rehearing. Petitioner thus was disbarred as of September 11, 1987.

(S) JOHN A. ARGUELLES
ACTING CHIEF JUSTICE

I LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 18th day of February A.D. 1988.

Clerk

By (S) R. Barrow
Deputy Clerk

APPENDIX 4

Omitted, officially reported "OPINION" of California Supreme Court July 13, 1987, Jerome B. Rosenthal vs. State Bar of California, 43 C.3d 612, 238 Cal.Rptr. 377.

APPENDIX 5

"NOTICE OF APPEAL" to Supreme Court of the United States filed in the Supreme Court of California, February 29, 1988.

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JEROME B. ROSENTHAL, Appellant, vs. THE STATE BAR OF CALIFORNIA, Appellee.	)	NO. LA 32260 [rec'd by Clerk, Cal.Sup.Ct. 11:03 a.m. February 28,1988]

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JEROME B. ROSENTHAL, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Order of the Supreme Court of the State of California (disbarring Appellant) as modified in denial of rehearing in final judgment entered on February 18, 1988.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2); this Notice of Appeal is given pursuant to Rule 11.3 of Rules of the Supreme Court of the United States.

DATED: February 24, 1988.

(S) JEROME B. ROSENTHAL
JEROME B. ROSENTHAL
Appellant Pro Se
6535 Wilshire Blvd.
Suite 800
Los Angeles, CA 90048
(213) 658-6411

APPENDIX 6

California Supreme Court Order May 27, 1987, recusing Chief Justice (Malcolm Lucas) from further participation in this proceeding

SUPREME COURT

F I L E D

MAY 27, 1987

Laurence P. Gill, Clerk

_____

Deputy

No. L.A. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JEROME B. ROSENTHAL

v.

STATE BAR OF CALIFORNIA

Petitioner's objection to the continued participation of Chief Justice Lucas having been presented to him, the Chief Justice on April 29, 1987, recused himself from further participation in this proceeding.

(S) Panelli J.
Acting Chief Justice

APPENDIX 7

California Supreme Court Order
August 6, 1987 extending time for granting,
denying rehearing to September 11 or the date
on which rehearing is granted or denied

SUPREME COURT

F I L E D

AUG 6, 1987

Laurence P. Gill, Clerk

Deputy

No. L.A. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JEROME B. ROSENTHAL

v.

STATE BAR OF CALIFORNIA

The time for granting or denying rehearing in the above cause is hereby extended to and including September 11, 1987 or the date upon which rehearing is either granted or denied.

(S) Panelli
Acting Chief Justice

APPENDIX 8

California Supreme Court Order
September 2, 1987, signed by (Malcolm) Lucas,
C.J., denying rehearing

ORDER DUE

September 11, 1987

ORDER DENYING REHEARING

L.A. No. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT

F I L E D

SEP 2, 1987

L...P. Gill, Clerk

DEPUTY

JEROME B. ROSENTHAL,
Petitioner

v.

STATE BAR OF CALIFORNIA,
Respondent

Petition for rehearing DENIED.

(S) Lucas
Chief Justice

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1896

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

SUPREME COURT

F I L E D

JUL 13 1987

Laurence P. Gill, Clerk

Deputy

C O P Y

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JEROME B. ROSENTHAL, Petitioner,	)	
v.	)	L.A. 32260
THE STATE BAR OF CALIFORNIA, Respondent.	)	

BY THE COURT:

This is a proceeding to review the unanimous recommendation of the Review Department of the State Bar Court (Review Department)[1] that petitioner Jerome B.

[1]The phrase State Bar Court shall be used herein to refer to the conjunction of the Hearing Panel and Review Department.

* Before Broussard, J., Panelli, J., Arguelles, J., Eagleson, J., Kaufman, J., Lillie, J., ** Spencer, J.**

** Court of Appeal, Second Appellate

Rosenthal be disbarred from the practice of law in California and that he comply with the requirements of rule 955, California Rules of Court.

The Hearing Panel[2] of the State Bar Court (Hearing Panel) unanimously recommended petitioner's disbarment and the Review Department unanimously adopted the panel's findings of fact and conclusions of law in making its recommendation. As shall appear, we conclude that the Review Department's recommendation of disbarment should be adopted.

I.

In December 1985 the Hearing Panel, after

District, assigned by the Chairperson of the Judicial Council.

[2]Throughout the record, the Hearing Panel was referred to as the "Committee." We use the former, more commonly used and modern term.

* Before Broussard, J., Panelli, J., Arguelles, J., Eagleson, J., Kaufman, J., Lillie, J., ** Spencer, J.**

** Court of Appeal, Second Appellate District, assigned by the Chairperson of the Judicial Council.

consideration of more than 80 days of testimony and documentary evidence, unanimously concluded that petitioner was culpable in 13 separate counts of misconduct and recommended disbarment. In May 1986 the Review Department filed its decision in accord.

Petitioner was found by both the Hearing Panel and the Review Department to have engaged in improper conduct during his representation of Doris Day Melcher, her late husband, Martin Melcher, her son Terrence Melcher, and various of their family owned corporations. Petitioner was found to have: engaged in transactions rife with undisclosed conflicts of interest, taken positions adverse to former clients, overstated expenses and double-billed for legal fees, failed to return client files or provide access to records, failed to give adequate legal advice or provide his clients with the opportunity to obtain independent counsel, filed fraudulent

claims and given false testimony, and engaged in conduct intended to harass his former clients, delay court proceedings, obstruct justice and abuse the legal process.

The State Bar Court concluded that petitioner (a) wilfully violated his oath and duties as an attorney under Business and Professions Code section 6067[3] by failing to discharge faithfully these duties to the best of his knowledge and ability; (b) wilfully violated his duties as an attorney under section 6068, subdivision (c), by maintaining proceedings he knew to be unjust or illegal abuses of process; (c) wilfully violated his duties as an attorney under section 6068, subdivision (g), by encouraging the commencement and maintenance of proceedings with corrupt motive of passion or interest; (e) violated his duties as an attorney under

---

[3]All further references, unless otherwise specified, are to this code. References to sections and rules will be to those in effect at the time of petitioner's relevant conduct.

section 6106 by committing acts involving moral turpitude or dishonesty; (f) violated his duties as an attorney under section 6077 by wilfully violating the following then-applicable Rules of Professional Conduct: (i) rule 4, by acquiring interests adverse to clients; (ii) rule 5, by accepting employment adverse to clients without their consent in matters in which he obtained confidential information by reason of or in the course of his employment by such clients; (iii) rule 6, by accepting employment without first disclosing his relation to an adverse party and his interest in the subject matter of the employment; (iv) rule 7, by representing conflicting interests without the consent of all parties concerned; (v) rule 13, by accepting and prosecuting cases solely for the purpose of harassing his clients and delaying them in prosecuting their claims against him; (g) violated other duties within the purview of sections 6067, 6068 and 6103 by failing to

perform legal services competently, refusing to properly account to clients for property and funds under his control, and refusing to deliver to his clients properties under his control which they were entitled to receive.

We will review the procedural history of the State Bar proceedings that have contributed to the massive record before us. In December 1968 Doris Day Melcher and her son, Terrence Melcher, filed a complaint with the State Bar against petitioner, their former attorney. At their request, an investigation of the charges was deferred until September 1971, when the complainants renewed their allegations.

In February 1972 the State Bar formally advised petitioner of the existence and substance of the complaint against him. In April of that year, petitioner answered. The matter was referred to the Hearing Panel, which calendared a preliminary hearing for late July. At the end of October, the panel

ordered that a "Notice to Show Cause" be issued. A notice was prepared, signed by the panel, and, in mid-January 1973, served on petitioner, who filed his answer in mid-March.

Hearings before the Hearing Panel finally began in November 1974.[4] On March 5, 1975, at

---

[4]The hearing date for the notice to show cause, originally continued to late March 1973, was set for late May. On May 30, it was continued again. On June 29, petitioner filed a notice requesting a substitution of examiner. On July 31, 1 hearing on that notice continued from August 15 to October 29 upon joint request. On September 18, petitioner filed a request to disqualify the examiner. On October 10, a hearing on petitioner's motions to dismiss and to disqualify the trial examiner was held. On October 29, the notice to show cause hearing was held; on November 2, the trial examiner withdrew. On January 29, 1974, Mr. Joseph L. Carr (now deceased) was appointed as trial examiner.

On April 16, petitioner requested that the formal hearings before the Hearing Panel be held in abeyance pending conclusion of the civil proceeding against him (Samet v. Day, an action initiated by petitioner, which was consolidated for trial with 12 other actions, 10 of which were also initiated by petitioner against the Melcher parties), which arose out of the same facts as those recited in the notice to show cause. On May 10, this request was granted; on September 18, the trial court announced its intended decision against petitioner in the civil matter. (In August 1985, the Court of Appeal unanimously affirmed

the fourth hearing session, the panel decided that the hearings would be postponed at least until a ruling by the Board of Bar Governors as to whether petitioner was entitled to appointed counsel by reason of indigency. Petitioner's request for appointed counsel was denied by the board on May 9, and review of that decision was denied by this court on January 14, 1976.[5]

---

the Samet v. Day decision in Day v. Rosenthal (1985) 170 Cal.App.3d 1125; a petition for rehearing was denied on September 6, 1985, and we denied a petition for review on October 16, 1985.)

Following yet another of petitioner's requests of a continuance, formal hearings commenced on November 6, 1974.

[5]Petitioner's request in a federal district court (Malcolm Lucas, Judge) for a temporary restraining order to prevent the prosecution of the bar proceedings against him until he could establish his claim of deprivation of his due process right to counsel was denied on March 16, 1976. Then Judge Lucas found, inter alia, "that the due process clause does not require the appointment and payment of counsel by the State Bar in bar disciplinary proceedings." The Hearing Panel thereafter denied petitioner's motion "requesting counsel on new facts," stating that it lacked jurisdiction to entertain such a motion and that the Supreme Court had already decided the

Hearings resumed in March 1976, when the State Bar's trial examiner, Mr. Carr, announced the State Bar's election to present the case through written materials which were previously the subject of civil, probate, bankruptcy and tax proceedings between petitioner and the complainants. (See §6049.2)[6]. Petitioner objected to the

---

indigency/counsel issues adversely to petitioner.

[6]Section 6049.2 provides: "In all disciplinary proceedings pursuant to this chapter [chapter 4 entitled "Attorneys"], the testimony of a witness given in a contested civil action or special proceeding to which the person complained against is a party, or in whose behalf the action or proceedings is prosecuted or defended, may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the nonavailability of the witness; provided, the board or administrative committee may order the production of and testimony by such witness, in lieu of or in addition to receiving a transcript of his testimony and may decline to receive in evidence any such transcript of testimony, in whole or in part, when it appears that the testimony was given under circumstances that did not require or allow an opportunity for full cross examination."

admission of any such materials on the ground that he had no opportunity to cross-examine at the pertinent proceedings and that Judge Lester E. Olson, who tried Samet v. Day (see ante, fn. 4), was biased and prejudiced against him.[7]

After another delay of nearly one and one-half years attributable to petitioner's objections regarding the civil proceedings evidence, the Hearing Panel finally ruled, in July 1977, that the approximately 95 volumes of civil transcripts from the Samet v. Day proceeding would be admitted for the limited purpose of determining whether, under section 6049.2, the testimony contained therein was given under circumstances not allowing an opportunity for full cross-examination. After

---

[7]Judge Olson, called as a witness on behalf of the State Bar, testified in several hearings. Petitioner extensively cross-examined him on, inter alia, the issue of possible bias.

undertaking the mammoth task of reading these transcripts, the Hearing Panel, in April 1978, unanimously found that the testimony in these consolidated cases "in which cases [petitioner] was a party or in whose behalf those cases were prosecuted or defended, may be received in evidence by transcript so far as relevant and material to the issues in these proceedings. [þ] The [Hearing Panel] specifically [found] that such testimony was given under circumstances that required or allowed [petitioner] an opportunity for full cross examination." Thereafter, the State Bar offered any transcripts from the proceeding it deemed relevant and the panel considered petitioner's other objections at the time of each offer.

Petitioner thereafter objected continuously during the Hearing Panel proceeding on grounds of relevancy, and

hearsay,[8] among others, to the State Bar's submission of the testimony of individual witnesses under section 6049.2. He also argued that the Hearing Panel could not take judicial notice of findings of fact, conclusions of law, orders or judgments in the underlying bankruptcy, probate, tax and civil proceedings. Petitioner further requested various continuances and injected the state of his health into the proceedings by arguing at length that he was not healthy enough to proceed. After hearing expert testimony and making its own observations as to petitioner's apparent good health, the Hearing Panel denied petitioner's motion for continuance based on his physician's declarations. Notwithstanding this adverse ruling and the fact that the State Bar concluded its evidentiary case against him in June 1979, petitioner refused

---

[8]At one point, petitioner consumed several pages of transcript in objecting on hearsay grounds to a letter admittedly signed by himself.

the panel's direction to present his defense on the merits, preferring instead to subpoena, without notice to the panel, the panel's medical expert, Dr. Windsor, and to cross-examine him on what the panel considered a "dead issue." This examination was conducted in such a manner that, in the words of Hearing Panel Chairman Mitchell, "in some instances it almost appeared as though [petitioner] might be engaged in an attempt to harass the witness." After petitioner's subsequent subpoena of Dr. Windsor was quashed by the Hearing Panel, he devoted another full hearing to eliciting the expert testimony of a doctor who had never physically examined him and possessed no opinion as to whether he was fit to defend himself in the bar proceedings.

Yet another full hearing was devoted to petitioner's presentation of a motion to dismiss the proceedings by admonition. After it denied this motion, the panel, at this November 1979 hearing, implored petitioner to

present evidence in his defense at the next hearing.[9] At the next hearing, following a preliminary statement consuming over 10 pages of transcript and reiterating objections he had made during the course of the lengthy proceedings, petitioner moved to extend the hearing schedule so that at least 45 days would elapse between each future hearing.

---

[9]The following exchange took place at the hearing's conclusion:
Chairman Mitchell: "We understand. Mr. Rosenthal, you are ready to proceed with some evidence?"
Mr. Rosenthal: "Not this evening. It's 10 minutes after 8:00, and I don't want to tell you men that I'll be ready to present at the next time. I'll just pursue my rights as I'm best able and as I see them."
Chairman Mitchell: "It seems, Mr. Rosenthal, that we are going to have to proceed with some evidence in the defense of this matter on some occasion sometime. We have asked you on a number of occasions to do that. You are either going to produce evidence in support of your defense in these proceedings or not. And if you elect not to, then we will simply have to close the proceedings and determine it on the evidence which has been produced."
Mr. RosenthaL: "A-ha."
Chairman Mitchell: "So we once again beg you, implore you, suggest, request, hope and expect, and I'm not trying to be facetious when I use those words, we ask again that you be ready to produce evidence at the next hearing in these proceedings. . . ."

After this motion was denied, petitioner finally commenced his defense.[10] In February 1981, Chairman Mitchell announced the resignation of Hearing Panel member Palmer due to the move of his law practice and home to Fresno.

Evidence presented by petitioner in defense consisted largely of his own testimony, that of his law firm's accountant, Walter Harrison, and that of numerous lawyers involved in the representation of petitioner and the Rosenthal parties at the trial and appellate levels in the underlying litigation. Petitioner also put on testimony by his ex-wife, another longtime acquaintance (who happened to be a disbarred attorney), and the data processing service operator who installed his law firm's record keeping equipment. A large portion of petitioner's defense was

---

[10]At the conclusion of the disciplinary proceedings, and again before this court, petitioner argued that there were unreasonable delays in the State Bar proceedings.

directed to the issue, raised by count II of the notice to show cause, whether his petition for removal of Terrence Melcher as administrator of Martin Melcher's estate was filed without basis in law or fact; count II was the single count upon which petitioner ultimately prevailed in these proceedings.

Throughout petitioner's defense, he frequently reraised claims about his ill health and "brain pain" attacks, and at one point actually sought to reopen the section 6049.2 issue that had taken the Hearing Panel so long to resolve. After petitioner had exhausted his list of witnesses and consumed the first of four consecutive hearings consisting solely of his own testimony and taking place over the better part of three months, he issued a belated subpoena duces tecum on January 12, 1982, in an attempt to compel the Los Angeles County Clerk to produce all of the exhibits used in the underlying Samet v. Day case. These exhibits were

described by the clerk's attorney as consisting of 83 Bekins-type packing boxes full of documents.

It was noted at the November 16, 1982, hearing that Mr. Carr, the State Bar's trial examiner from the inception of the proceedings, had passed away and that Arthur Margolis had been substituted in his place. Subsequently, several hearings were devoted to resolving the county clerk's resistance to the subpoena duces tecum in light of the fact that it was unclear whether petitioner could or would pay for reproduction of the voluminous exhibits. The matter was finally solved by the State Bar Court's willingness to inspect the necessary documents and hold the necessary hearings on the premises of the county courthouse pursuant to an arrangement whereby the State Bar Court would compensate the county's custodian of the records for necessary overtime. After denial by Assistant Presiding Referee Fried of petitioner's motion

to continue and hold the proceedings in abeyance, apparently pending appellate resolution of the Samet v. Day matter, petitioner sought another continuance based on a two-year-old medical declaration concerning the condition of his heart, which was denied.

Petitioner's motion to reopen to call further witnesses, including Doris Day, was denied by the Hearing Panel on February 2, 1983, and the panel scheduled May 1 as the due date for the State Bar's opening written brief, to which petitioner was to have 60 days to respond, followed by the bar's reply brief in another 30 days. Due to Mr. Carr's untimely death, the voluminousness of the record, and Margolis's unfamiliarity with the case, the State Bar was unable to make this deadline. On February 29, 1984, upon a joint motion for continuance, the Hearing Panel ordered the proceedings to be held in abeyance for 90 days while the parties sought a stay from Chief Presiding Referee George. After

denial of the motion, the Hearing Panel, at the final August 16, 1984, hearing, established a final briefing schedule allowing the State Bar 90 days to submit its brief and respondent 120 days thereafter to respond.

II.

Petitioner is, and at all relevant times was, an attorney licensed to practice law in California. At all times relevant to his association with the Melchers, petitioner practiced law under his own name or with law firms containing his name. He has no prior record of discipline.

In May 1956, petitioner entered into a retainer agreement with Doris Day Melcher and continued to represent her as an attorney, business manager, business advisor and agent until his services were terminated in July 1968. About the time of the Day retainer agreement, petitioner entered into a retainer agreement with Day's husband, Martin Melcher, and assumed similar responsibilities until

Melcher's death in 1968. During the same period, petitioner also represented several corporations in which the Melchers owned an interest, including: Arwin Productions, Inc., Daywin Music, Inc., Artists Music, Inc., and Martin Melcher Productions, Inc.

After Martin Melcher's death in 1968, petitioner represented Terrence Paul Melcher, who was the personal representative of his father's estate, as his attorney. Terrence Melcher discharged petitioner in May 1968.

A. Petitioner's Failure to Account and Return Records

The trial court in Samet v. Day found that throughout the period during which petitioner represented the Melchers, Day and Melcher were neither sophisticated investors nor experienced in business affairs and were dependent on petitioner for legal and business advice, and susceptible to his influence. The State Bar Court found that during the period in which petitioner represented the Melchers, he prepared, maintained and controlled

numerous files and records important to the personal and business affairs of the Melchers. Following petitioner's termination as the Melchers' attorney, numerous requests and demands were made by and on behalf of the Melchers for the return of these files and records and for an accounting of their affairs. Petitioner, however, refused to return all of his former clients' records and files or to render an accounting. As a consequence of petitioner's conduct, the Melchers had to petition the court for a receiver who was appointed to obtain the records. Petitioner still resisted, and sheriff's deputies were summoned to his office to take possession of the files and records when he refused to unlock the file room to provide access. The foregoing proceedings resulted in substantial expenses to the Melchers.

The Samet v. Day trial court set forth detailed findings evidencing the numerous

requests for the Melchers' records made on petitioner, petitioner's conduct necessitating appointment of a receiver, and petitioner's refusal to cooperate with the receiver.[11] The

---

[11]Section 6049.1 provides in pertinent part: "In all disciplinary proceedings in this State, certified or duly authenticated copies of findings, conclusions, orders or judgments made or entered in any court of record, or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, of any State or Territory of the United States or of the District of Columbia in any disciplinary proceeding therein against the same person, shall be admissible in evidence, and so far as relevant and material shall be prima facie evidence of the facts, matters and things set forth therein."

Petitioner attacks the admission of civil findings, conclusions, orders and judgments as evidence in the disciplinary proceedings against him because they were not themselves made in disciplinary proceedings. We believe, however, that the statute addresses only the subject of findings rendered in other disciplinary proceedings and does not speak to the issue of when such evidence originating in ordinary civil proceedings is admissible. Because the Legislature's intent seems to have been focussed on removing doubt that the State Bar Court could consider such evidence when rendered in disciplinary proceedings, but the statute is silent upon the rule in civil proceedings, we view it as inapplicable to the latter and do not apply the expressio unius principle. Petitioner fails to distinguish our controlling decision in Caldwell v. State Bar (1975) 13 Cal.3d 488, 496-497, holding

Melchers incurred damages of $169,330 as a direct and proximate result of petitioner's wrongful retention of the records. Of this amount, approximately $67,000 was paid to the court-appointed receiver for his services. The trial court further concluded that all information relating to the Melchers' business ventures and investments came from and was available only through petitioner.

The State Bar Court found that, while intentionally refusing the Melchers access to pertinent records, petitioner also filed various claims asserting ownership interests, profit shares and other proprietary rights in certain Melcher business ventures. The State Bar Court concluded that petitioner's refusal to furnish records or access to records was

---

such nondisciplinary civil matters admissible as evidence in the disciplinary proceedings when there is "essential identity of the factual issues in both proceedings." Our independent review of the record compels our concurrence with the State Bar's position that the nontestimonial evidence from other proceedings to which petitioner was a party was properly admitted here under Caldwell.

unreasonable, unjustified and intended to harass the Melchers and delay and prejudice their defense of his claims.

B. Ethical Breaches in Connection with the Dallas Cabana Hotel Bankruptcy Proceedings

1. Petitioner's Filing of a Sham Plan of Arrangement and Subsequent Debt Claim Formulated to Deprive the Melcher Plan of Majority Approval

After his termination as Terrence's attorney, petitioner filed a bankruptcy petition in the matter of the Dallas Cabana Hotel, a corporation he had helped form and had induced the Melchers to invest in, as shall be explained in greater detail below.

The State Bar Court found that petitioner (1) failed to timely file required documents necessary to the bankruptcy proceeding, even though ordered by the court to do so, (2) filed a sham plan of arrangement, and (3) filed a sham debt claim for the purpose of denying majority approval to the Melcher plan of arrangement. These findings are fully

supported by the following findings of the bankruptcy court that presided over the matter (United States District Court for the Northern District of Texas, Dallas Division).

In late November 1968, petitioner caused to be filed on behalf of Dallas Cabana, Inc. a petition in bankruptcy court. Petitioner filed the petition without a schedule of assets and liabilities, a statement of affairs or a statement of executory contracts.[12] Despite a court order that they be filed by December 5, 1968, petitioner did not file the required documents until April 1, 1969.

On February 11, 1969, the bankruptcy court ordered all plans of arrangement for the hotel to be filed by March 3. The Melchers complied with the order and proposed a plan of arrangement based on the sale of the hotel to Donald Pritzker, president of Hyatt

---

[12]In November 1968, Terrence Melcher filed a second petition on behalf of Dallas Cabana, Inc. The Melcher group filed its requested documentation within the time prescribed by the court.

Corporation, for $4.5 million. Attached to the plan was a duly executed contract of sale supported by a cash deposit of $100,000. The contract provided that if the court did not enter an order approving the sale by June 24, 1969, Pritzker could withdraw his offer. ,

Before the hearing ont eh Melcher plan of arrangement, 100 creditors whose claims totaled $1,872,000 accepted the Melcher plan. The plan was not accepted by 48 creditors whose claims totaled $591,302, and of that sum, $558,262 represented claims filed by Cabana Management, a firm owned and controlled by petitioner and Rosenthal & Green, petitioner's former law firm.

Petitioner did not file his plan of arrangement by March 3 or by the time of the hearing on the Melcher plan. Instead, petitioner attempted to block the sale to Pritzker by inflating the claims of both Cabana Management and Rosenthal & Green to over $2,296,000, thus creating the false

impression that petitioner's group possessed the majority interest. The bankruptcy court specifically found that these amended claims were grossly exaggerated and false and were filed for the purpose of blocking confirmation of the Melcher plan of arrangement.

Petitioner thereafter moved for an extension of time until May 1, 1969, to file his own plan of arrangement. Although the court was of the opinion that the Pritzker offer was a fair one and although the hotel was operating at a loss, thereby decreasing the equity potentially available to unsecured creditors, the court granted petitioner's motion on the condition he file a schedule of assets and liabilities by April 1, 1969.

On April 1, petitioner filed the requisite schedules, which the court found were, for the most part, the same schedules the Melchers had filed. Although filed by the May 1 deadline, petitioner's plan of arrangement was found by the bankruptcy court to be "a sham, filed in

bad faith and . . . interposed solely for the purpose of attempting to prevent this Court from considering the adjudication of the debtor as a bankrupt on [the scheduled hearing date of] April 30, 1969. [Petitioner] Rosenthal's arrangement had attached a proposed sales contract dated April 7, 1969. The plan alleged that 'Prior to the filing of this arrangement, the debtor (for itself and other sellers therein named) has negotiated a purchase agreement with the buyer.' That allegation was false and [petitioner] knew it to be false. At the time [petitioner] filed his plan, the proposed purchasers not only had not signed the contract, but had not even orally agreed to it."

Petitioner's conduct and dilatory tactics caused the withdrawal of Pritzker's first offer and the subsequent acceptance of a lower offer resulting in a substantial monetary loss to the bankrupt estate.

2. Petitioner's Pretrial Misrepresentations to the Bankruptcy

Court

The State Bar Court made the following findings with regard to petitioner's misrepresentations to the bankruptcy court in Dallas: (1) Petitioner first represented that the Melcher interests owned the Dallas Cabana Hotel; however, when a bona fide offer to purchase that asset was received, he falsely stated that the hotel was actually owned by a joint venture; (2) on six separate occasions in 1969, petitioner misrepresented the value of the Dallas Cabana Hotel; (3) three times in 1969, petitioner falsely asserted that a purchaser was ready, willing and able to pay, and had offered to pay, in excess of $4.5 million for the Dallas Cabana Hotel; (4) in February 1969, petitioner supported his opposition to the issuance of an order directing the filing of plans of arrangement with the misrepresentation that he had been denied access to Dallas Cabana Hotel books and records; (5) in May 1969, petitioner opposed

the issuance of an order quieting title to the Dallas Cabana Hotel and supported his opposition with the following misrepresentations: (a) his former client had illegally seized records containing information essential to his preparation for the hearing on that order; (b) the above seizure was then the subject of an appeal in California state courts and hence the bankruptcy court should not act pending resolution of that appeal; and (c) the seized records were stored 10 to 15 miles from petitioner's office; (6) petitioner supported his objections to interrogatories of the trustee in bankruptcy with the misrepresentation that a receivership established by a California court had deprived him of access to records necessary to allow him to answer such interrogatories; and (7) each of the above statements was made intentionally, with knowledge of its falsity, for the purpose of delay, and in bad faith,

and resulted in obstruction of justice.

The State Bar Court's findings are fully supported by the findings of the bankruptcy court.

3. Petitioner's Other Pretrial Conduct in the Bankruptcy Proceedings

The State Bar Court found that before the trial in the Dallas bankruptcy proceedings, petitioner engaged in conduct intended to delay commencement of the trial, harass his former clients and obstruct the orderly administration of justice. The bankruptcy court concluded that "the same conduct which was characteristic of [petitioner] and those he controlled during the course of other matters in these proceedings characterized the claims litigation -- delay, misrepresentation, misconduct in court and an overall attempt at frustrating the progress of the bankruptcy proceedings."

In late November 1969, within 10 days of the start of the bankruptcy trial, petitioner, his law partner Green, and Cabana Management

filed a motion to disqualify William J. Rochelle, Jr., Phillip J. Palmer, Jr., and J. Ronald Trost as cocounsel to the trustee in bankruptcy. The bankruptcy court noted that its order authorizing the employment of these individuals was entered after an evidentiary hearing in May 1969, that pursuant to the trustee's application it had authorized an increase in the scope of employment of these counsel, and that petitioner had waited five months until the eve of trial before renewing his disqualification objection. Finding that "[petitioner's] obvious purpose in filing the motion on the eve of trial was to gain a continuance because if counsel were disqualified, it would have taken months for new counsel to prepare for trial," the court nevertheless "again considered the issues raised in the disqualification motion and again found them to be totally without merit."

Moreover, the bankruptcy court further found that petitioner's dilatory tactics

continued up to the day of trial. Six days before trial, petitioner filed a petition to transfer the entire bankruptcy proceedings to California. Petitioner, his partner Green and his employee Harrison each refused to sign their depositions. Finally, despite the statement of petitioner's counsel to the contrary, necessary amendments to the claims of Rosenthal & Green and Cabana Management were not made before the start of trial. The trial court in Samet v. Day made similar findings with respect to petitioner's propensity for delay and abuse of the judicial process.

4. Petitioner's Obstructive Conduct During the Bankruptcy Trial

The State Bar Court determined that during the Dallas bankruptcy proceeding, petitioner engaged in conduct intended to delay the trial's progress, harass the Melchers and obstruct the orderly administration of justice. Petitioner's conduct included his (1) obstinate, insulting and defiant conduct

toward the court; (2) evasive testimony; and (3) specious objections to questions asked by opposing counsel. These findings are amply supported by those of the bankruptcy court, which found, inter alia, as follows: "Not only was [petitioner] an evasive witness, he was so insulting and rude, both to the court and opposing counsel, that I can only conclude that he was attempting to goad this court into error. [þ] [Petitioner] was on the stand for two days. When examined on direct, he had a precise memory for conversations dating back to 1960. When questioned on cross-examination, he was repeatedly evasive. The cold record of his testimony in print is only part of the story . . . . Observations by this Court of his obstinate and defiant conduct, the emphasis in his speech, his snide remarks, the tone of his voice, his frequent sarcasm toward this Court and opposing counsel, his convenient lack of memory and his alleged 'inability' to understand routine

questions put to him, made it clear he was not telling the truth. [þ] Because of [petitioner's] hostility and gross impertinence toward the Court, I inquired of [petitioner's] counsel whether [petitioner] would be a cooperative witness, but it was soon apparent that [petitioner's] counsel could not control [him]. On several different occasions after [petitioner] took the stand under protest, [petitioner] had to be restrained by his counsel in order to prevent a total breakdown of the trial proceeding."

In a decision sustaining each of the actions of the bankruptcy referee, the Fifth Circuit Court of Appeals made the following observations with respect to petitioner's conduct: "Nor do we find error by the Referee in terminating the hearing on the claims presented by [petitioner] and his associates. The Referee found that [petitioner] was not acting in good faith during the hearings on the validity of claims, but was intentionally

delaying this part of the action. His techniques for obstructing the progress of these proceedings included failure to appear at hearings, frequent and unmeritorious excuses for walking out of depositions, refusals to answer interrogatories, repeated dilatory pretrial motions and requests for continuances, and obstinate conduct on the witness stand." (Dallas Cabana, Inc. v. Collier (5th Cir. 1972) 469 F.2d 606, 609-610.)

5. Petitioner's False Testimony Under Oath

The State Bar Court found that during the Dallas bankruptcy trial, petitioner testified that his law firm had not received payment for legal services rendered to the Dallas Cabana Hotel, and that this testimony was knowingly false, as his firm had received $20,000 for such services. The bankruptcy court specifically found that "[petitioner] testified on at least three different occasions that his firm had never been paid

any amount whatsoever for legal services due from the Dallas Cabana. In truth and in fact, [petitioner's] own files contained a letter from his secretary acknowledging the receipt of $20,000 from the Dallas Cabana Hotel 'for legal services to date.'"

C. Petitioner's Representation of Conflicting Interests

In January 1963, petitioner created and incorporated Cabana Management, Inc. He became an officer and director as well as the corporation's controlling stockholder. Cabana Management, Inc. was used by petitioner as his alter ego to manage and control the operations of both the Palo Alto and Dallas Cabana Hotels.

The State Bar Court found that petitioner's creation of Cabana Management, Inc. to manage the interests of the Palo Alto and Dallas Cabana Hotels resulted in (1) Cabana Management, Inc.'s interest being adverse to petitioner's own clients; (2) petitioner's representation of conflicting

interests without having obtained the consent of all parties involved; and (3) Cabana Management, Inc.'s establishment as a fraudulent device for the purpose of obtaining funds through sham, exaggerated and duplicative claims made by petitioner's law firm for services previously rendered. These findings are fully supported by the record.

Petitioner's participation in the hotel operations began in 1959 and continued until his termination as the Melchers' attorney in 1968. In 1959, petitioner represented Clifford Heinz of Heinz Enterprises (Heinz), who was interested in constructing a luxury hotel to be known as the Palo Alto Cabana Hotel. Through Heinz, petitioner met Jay Sarno, a hotel promoter and developer, who became involved with the Palo Alto Cabana Hotel and later with the Dallas Cabana Hotel. Petitioner acted as attorney for both Heinz and Sarno in the hotel matters and assumed additional duties, including the arranging of

financing for the hotels.

In 1960, petitioner advised the Melchers (Doris Day Melcher, Martin Melcher and Arwin Productions, Inc.) to advance funds for the Palo Alto hotel in return for an undefined equitable interest in the hotel. In 1961, when Sarno was promoting the Dallas Cabana Hotel, petitioner once again advised the Melchers to advance funds for the construction of the hotel.

In connection with these investments, petitioner acted as attorney for all the parties. While so doing, petitioner failed to inform the Melchers of the actual and potential conflicts of interest between the Melchers and his other clients, including the fact that Heinz and Sarno did not contribute any of the initial capital, as was expected by the Melchers, and did not pay any of the initial expenses of the hotels, even though they received interests substantially equivalent to the Melchers'. Petitioner also

failed to disclose to the Melchers that he obtained an interest in the hotels without contributing either capital or services, other than services for which he was already compensated by the Melchers.

Between 1962 and 1968, additional capital was required to pay the hotels' obligations. Although petitioner advised the Melchers to continue advancing cash, he failed to advise them that the hotels were insolvent and severely under-capitalized. Petitioner also neglected to advise the Melchers that, because of these problems, the obligations owed them for their additional investments would not be met. Instead, petitioner induced the Melchers to use personal funds to pay obligations, without limitations, including the hotels' mortgages, promissory notes for the purchase of furniture and the services of the general contractor and other notes and guaranteed obligations. Petitioner further advised the Melchers to pay Heinz and Sarno's respective

shares of their joint and several obligations while failing to take appropriate steps to protect the Melchers' right to contribution.[13]

Between 1961 and 1968, petitioner advised the Melchers that the hotels would be profitable and that each hotel had a fair market value substantially in excess of its true fair market value. Petitioner, who had an interest in each hotel for himself and his law firm, failed to take any action necessary to allow the Melchers to make independent, informed decisions with respect to payments made for the hotels' continued operation. Petitioner failed to render independent legal

---

[13]Petitioner represented to the Melchers that their investment in the hotels would be one of limited liability in that it was oral and that Heinz Enterprises, Sarno and the Melchers would each be liable for only one-third of the hotels' obligations. Petitioner negligently failed to reduce this oral contract to writing so as to preserve the Melchers' rights of contribution without expensive litigation. Thus, the Melchers, while in fact personally liable for most of the hotels' obligations, received no clearly definable interests in the hotels' assets and had no readily enforceable recourse against coparticipants.

advice or advise the Melchers to seek independent counsel. He also failed to disclose adequate or accurate financial and other material information about the hotels. By the time the Melcher parties had obtained independent legal counsel in mid-1968 following Martin Melcher's death, the Palo Alto Cabana Hotel was insolvent. The Dallas Cabana Hotel was adjudicated bankrupt in May 1969.

D. Petitioner's Purchase of Federal Land Bank Bonds for Himself While Purchasing the Same Investment for his Clients

The State Bar Court found that around March 1953, petitioner negotiated the purchase of $3 million worth of Federal Land Bank bonds for Martin and Doris Day Melcher. The bonds were purchased from petitioner's client, Bernard Cantor, of the Cantor-Fitzgerald Company. Under the purchase plan, which was supposed to produce losses that would generate tax savings for the Melchers, they acquired the bonds on credit and executed a promissory

note bearing a 4.25 percent interest rate. While representing the Melchers' interests in this transaction, petitioner, without their knowledge or consent, negotiated for himself the purchase of $1 million worth of the same bonds on credit at an interest rate of only 3.5 percent. Petitioner's failure to arrange the same rate for the Melchers resulted in their paying over 400 percent more in out-of-pocket expenses than petitioner paid in this regard. This finding has abundant support in the record of Samet v. Day and was also detailed in the Court of Appeal decision affirming that judgment, which we may judicially notice. (See Day v. Rosenthal, supra, 170 Cal.App.3d at pp. 1137-1138.)

E. Petitioner's Conduct During His Deposition in the Matter of Doanbuy Lease and Company v. Melcher et al.

In 1969 petitioner, acting as president of Doanbuy Lease and Company, Inc. (hereafter Doanbuy), filed four separate actions in the District Court of Lea County, New Mexico,

against the Melchers and other named defendants. Each of these lawsuits alleged that defendants were indebted to Doanbuy for proportionate shares of expenses incurred by the company in operating gas and oil wells in New Mexico.

In April 1970, the Melcher interests successfully moved the New Mexico court to compel the deposition of petitioner in California. When petitioner appeared at his April 28, deposition, his conduct was evasive and hostile, and he repeatedly interposed bad faith objections. The deposition was terminated when, at the close of the day, petitioner indicated he would not return for the next day.

Thereafter, the Melcher parties filed a motion to dismiss the New Mexico action on the ground that petitioner, an officer and managing agent of Doanbuy, wilfully failed to appear for his deposition after having been duly served with notice. The trial court

ordered, inter alia, that petitioner be given an opportunity to remedy the matter, that the deposition should be promptly taken in New Mexico and that the Melcher parties' motion would thereafter be heard.

The Melcher parties immediately noticed the deposition of petitioner for late June in New Mexico. Doanbuy moved for a protective order quashing the notice of taking the deposition or, in the alternative, limiting its scope. At a hearing on the matter, the court ruled that petitioner must submit to a New Mexico deposition, but that the time therefor was limited to two eight-hour sessions. On July 9 and 10, petitioner appeared for scheduled deposition. He engaged in conduct similar to that manifested during the earlier Los Angeles deposition. The Melchers successfully renewed their motion to dismiss on the ground that petitioner refused to appear and give his deposition, and the trial court's order of dismissal was affirmed

by the Supreme Court of New Mexico. That high court, in a published opinion, summarized petitioner's conduct:

"Mr. Rosenthal's conduct at the deposition is somewhat difficult to describe. . . . . [T]he . . . [New Mexico July 9 & 10] deposition seems worse than the one taken in Los Angeles. The statements of Mr. Rosenthal consisted of evasions, expressions of hostility, insults, admonitions, objections, demands that counsel explain what bearing questions had upon the issues as prerequisites to answering, arguments and other similar responses. Pages are consumed by statements of inability to remember, which strain credulity to the breaking point, and with refusals to answer questions because of a claim that a question is pending that the witness cannot understand and will not permit to be withdrawn. These are merely examples." (Doanbuy Lease and Co. v. Melcher (N.M. 1971) 488 P.2d 339, 341.)

F. Petitioner's Filing of Numerous Lawsuits Against the Melcher Parties

The State Bar Court found petitioner filed numerous lawsuits for the purpose of harassing his former clients.

In the Samet v. Day decision, the trial court found petitioner "misused the confidential information previously imparted to him by his clients for his own gain, in filing unfounded claims, vexatious lawsuits and other legal proceedings in California, New Mexico, Oklahoma and Texas. He skillfully and with malice abused the process of courts to harass his former clients."

The trial court additionally found that "[a]ll of the legal proceedings instituted by [petitioner] against the Melcher parties were initiated and prosecuted for corrupt motives including spite, harassment and delay. [Petitioner] knew or should have known that the allegations contained in pleadings which he verified were false." The court accordingly imposed attorney fees of $850,000

against the Rosenthal defendants based on the multiplicity of civil proceedings initiated by petitioner Rosenthal and the lengthy and complex preparations required of the Melchers' attorneys in the defense of 11 consolidated cases instituted by petitioner.

The trial court concluded that petitioner's initiation of 18 separate legal proceedings in 5 separate state and federal courts was oppressive and malicious and was motivated by his recognition that the multiplicity and conduct of all the litigation would cause the Melcher parties to incur additional expenses and could force them to accept an inequitable settlement of his false claims.

G. Petitioner's Failure, as Attorney for the Melcher Estate, to Disclose His Interest in Payments Made on the Estate's Behalf

After Martin Melcher's death in April 1968, petitioner caused Terrence Paul Melcher to be appointed administrator of his late father's estate. Petitioner thereafter

advised Terrence to authorize certain payments on behalf of the estate, including, but not limited to, a payment of $60,000 to Republic Supply Company and a payment of $17,000 to Arkansas-Louisiana Production Co.[14] Petitioner failed to disclose, inter alia, that these payments were made to finance business ventures supported by petitioner and that, at the time petitioner advised Terrence to make the payment to Arkansas-Louisiana Production Co., a lawsuit was pending against petitioner by that company.

The trial court further found that Terrence, at the time of these transactions, was 26 years old and had no prior contact or familiarity with the investment or business

---

[14]The State Bar Court also found that petitioner caused Terrence to execute a $136,000 promissory note to Arwin Productions, Inc., and the State Bar so contends in its brief. The State Bar's citations, however, disclose no basis for this finding, nor does our independent review of the record before us. We find this minor discrepancy an anomaly that does not affect our disposition of the issues before us.

affairs of his parents. Instead, he relied exclusively on petitioner to act in the best interests of the Melcher family. The trial court concluded that petitioner did not render or invite Terrence to obtain independent legal advice regarding the payments and that the failure to do so constituted negligence and a breach of the fiduciary and contractual duties owed to Arwin Productions, Inc., Terrence and the estate.

III.

Petitioner's brief in this court presents a largely technical defense devoid of any sincere discussion of the merits of the serious findings against him. He asks that we strike or disregard the State Bar's brief and dismiss the proceedings entirely, or, in the alternative, either dismiss the proceedings with admonition (Rules Proc. of State Bar, rule 415), or remand the matter to the State Bar Court with appropriate instructions so

that he may obtain a fair hearing before a new Hearing Panel.

In support of these requests, petitioner submits a lengthy and disjointed list of arguments, which can best be summarized as follows: (1) the admission of the Samet v. Day trial transcripts denied petitioner a fair trial because: (a) petitioner's Sixth Amendment confrontation rights were thereby violated, (b) Evidence Code section 1291, subdivision (a)(2)'s narrow exception to the hearsay rule was thereby contravened, (c) section 6049.1 prohibits admission of such transcripts, (d) petitioner had no opportunity to read the transcripts before they were admitted, contrary to the Hearing Panel's promise that he would be allowed to do so, (e) admission of the transcripts improperly lowered the standard of proof in State Bar proceedings from "clear and convincing" to a "preponderance" standard, (f) the Hearing Panel exceeded its jurisdiction by admitting

the transcripts sua sponte, and (g) the evidence is irrelevant and prejudicial; (2) the State Bar Court violated petitioner's right to procedural due process by finding he had committed acts uncharged in the notice to show cause; (3) the Hearing Panel improperly restricted petitioner's defense by submitting the matter for decision when his brief was three months late; (4) the Hearing Panel was biased and prejudiced against petitioner; (5) the Hearing Panel improperly admitted the findings, judgments and conclusions of other courts; (6) the Hearing Panel improperly refused to allow petitioner to see or to ask detailed questions about a document ruled, in accordance with the State Bar trial examiner's request, a nondiscoverable work product; (7) the Review Department denied petitioner a hearing and failed to independently review the record; (8) the State Bar has waived the right to deny the truth of any of petitioner's factual and legal contentions which it did not

specifically reply to in its brief before us, thus establishing a complete defense for petitioner; (9) the lengthy proceedings should be dismissed on the ground of delay prejudicial to petitioner; and (10) petitioner's lack of prior discipline is a significant mitigating circumstance.

Because we find petitioner's arguments completely meritless, we conclude that he has failed to carry his burden of showing that the Review Department's recommended discipline of disbarment should not be followed. (Emslie v. State Bar of California (1974) 11 Cal.3d 210, 219-220.) We will address his arguments briefly.

As noted above, when the State Bar evidentiary proceedings commenced in 1976, the State Bar elected to present its case against petitioner through certain written materials that were previously the subject of civil, probate, bankruptcy and tax proceedings between petitioner and the complainants. As

we have noted (see ante, fn. 6), in disciplinary proceedings against attorneys, "the testimony of a witness given in a contested civil action or special proceeding to which the person complained against is a party, or in whose behalf the action or proceeding is prosecuted or defended, may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the nonavailability of the witness . . . ." (§ 6049.2.)

Petitioner was either a party plaintiff or defendant in each underlying civil proceeding whose transcripts were introduced into evidence or, as in the case of the suits involving his law firm and the corporations he controlled, a person upon whose behalf the litigation was prosecuted or defended. In each proceeding, petitioner enjoyed a full opportunity, and had a strong motivation

effectively to cross-examine adverse witnesses. While petitioner may well have been unaware that unethical conduct disclosed and manifested during the various civil proceedings he initiated or defended would actually be charged against him by the State Bar, he had, at that time, ample interest and motive in refuting any false accusations or statements in this regard. Insofar as his conduct of the proceedings themselves is now challenged as an abuse of process, he cannot seriously claim a lesser motive in proving his assertions in those proceedings on behalf of himself, his corporations, and his clients, than he has in proving the same assertions now on behalf of his license to practice law. Hence, under section 6049.2, all relevant testimonial transcripts from the underlying civil proceedings were properly admitted in evidence in the instant disciplinary proceedings. (Eschwig v. State Bar (1969) 1 Cal.3d 8, 18.) We find also that, as to those

actions in which petitioner was a nominal party, Evidence Code section 1291, subdivision (a)(2), compels the same conclusion.

Furthermore, petitioner provides no record citations in support of his broad claims of undue prejudice from the admission of the records of the underlying civil litigation. Although the usual rules of evidence for civil cases in courts of record are generally followed in formal State Bar Court proceedings, "no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error or errors complained of resulted in a denial of a fair hearing." (Rules Proc. of State Bar, rule 556.)

Additionally, the pleadings, findings, conclusions, and judgments in the underlying actions were both properly admitted in evidence before the Hearing Panel (see ante, fn. 11), and are subject to judicial notice by this court as well, where, as here, the

factual issues in the underlying proceedings and the disciplinary proceedings are essentially identical. (Caldwell v. State Bar, supra, 13 Cal.3d at pp. 496-497.)

Petitioner's citations to criminal cases and attempted invocation of a "quasi-criminal" talisman do not support his confrontation-clause claims. Petitioner's only due process entitlement is a "fair hearing," and the rules of criminal procedure do not apply in State Bar disciplinary proceedings. (Smith v. State Bar (1985) 38 Cal.3d 525, 532; cf. Eschwig v. State Bar, supra, 1 Cal.3d at p. 18.)

Petitioner's contention that admission of the civil court findings, conclusions and judgments impermissibly lowered the standard of proof in State Bar proceedings from "clear and convincing" evidence to the lower "preponderance" standard of civil cases is also meritless. It is, of course, well settled that we must independently examine the evidence and pass upon its sufficiency in

State Bar matters. (Alberton v. State Bar (1984) 37 Cal.3d 1, 11.) Petitioner, however, bears the burden of demonstrating "that the charges of unprofessional conduct are not sustained by convincing proof and to a reasonable certainty." (Himmel v. State Bar (1971) 4 Cal.3d 786, 794.) The civil findings, conclusions and judgments at issue here were not judicially noticed for their truth or given preclusive effect by the State Bar Court and, under Caldwell v. State Bar, supra, 13 Cal.3d at pages 496-497, they were properly admitted into evidence because they addressed issues substantially identical to those before that court in the disciplinary proceeding. These civil court pronouncements provided a sufficient basis for the State Bar Court's findings; our independent review of the record reveals that petitioner has not carried his burden of showing these findings to be unsupported by the evidence. (Trousil v. State Bar (1985) 38 Cal.3d 337, 341.)

Moreover, petitioner has not attacked the truth of the State Bar Court's findings and conclusions except to say that he is guilty of "no wrongdoing whatsoever."

Petitioner alleges that he was denied a fair hearing because of numerous other actions taken by the State Bar Court. He claims the Samet v. Day transcripts were unfairly admitted sua sponte in excess of the Hearing Panel's jurisdiction and in breach of the Hearing Panel's promise that he would have an opportunity to review and read them before the committee did so. Petitioner's record citations disclose no such promise and, even if they did, no prejudice would be shown. The record discloses that petitioner was given more than enough time to review any and all documents before they were introduced into evidence. A great many of the yea4rs spent compiling the 81 volumes of transcripts amassed during the proceedings before the Hearing Panel were devoted to petitioner's

claims on the admissibility of the underlying civil transcripts. The State Bar announced from the outset of the evidentiary proceedings and repeated frequently in oral motions that its intention was to introduce all of the Samet v. Day transcripts. After much argument, the transcripts were all admitted for the limited purpose of determining whether the underlying proceeding occurred under circumstances which provided petitioner an opportunity for adequate cross-examination. It was correctly determined that these circumstances existed. Petitioner had more than adequate time and ample warning to review transcripts with which he was already presumably familiar. No unfairness or jurisdictional impropriety appears.

Several of petitioner's claims, although patently meritless, would not have demonstrated an unfair hearing even if accepted. The uncharged offenses that the Hearing Panel found supported by the evidence

were included not in its findings of fact or conclusions of law, but in a section of its decision entitled "Matters in Mitigation of Aggravation." We have not relied on these uncharged offenses in making our disciplinary decision and we find that they could not conceivably have changed the State Bar Court's recommendation even if refuted, especially since no matters in mitigation were found. The "illegally constituted" body of the Hearing Panel members petitioner claims was created when panel member Palmer resigned after approximately seven years of service did not prejudice petitioner; the record, to the contrary, reveals that Palmer disagreed with petitioner's contentions more often during his tenure than the remaining two members.

We have held "that participation by two members of a three-member panel constitutes a valid hearing for purposes of disciplinary action against a member of the State Bar." (Baranowski v. State Bar (1979) 24 Cal.3d 153,

165; Petersen v. State Bar (1943) 21 Cal.2d 866, 870-871.) As petitioner fails to convincingly distinguish these cases, and no prejudice has been shown, we find no error.

The argument that petitioner's defense was unfairly and abruptly truncated when his brief was three months late is frivolous -- it was and is obvious that the reason for petitioner's continual delay was his lack of a meritorious defense. Likewise, petitioner's claims of Hearing Panel bias and prejudicial delay are not only unsupported by the record, but are contradicted by it. Under the circumstances, the panel members showed great restraint and gave petitioner wide latitude to conduct his defense as he saw fit. His claim that a "secret" sealed document was viewed by the Hearing Panel alleges no prejudice and our independent review of the record, including this document, a State Bar inter-office communication, discloses none.

Petitioner's claim that the Review

Department denied him his right to a "hearing" -- as distinguished from oral argument -- is frivolous in light of the extensive hearing his claims received below and the generous time concessions made to him during his Review Department argument.[15] Petitioner's argument that the Hearing Panel acted unlawfully with regard to the subpoena duces tecum issued to the Clerk of the Los Angeles County Superior Court, in order to procure certain documents in connection with the Samet v. Day transcripts, is unsupported by citation to legal authority or explanation as to how petitioner was thereby prejudiced. Petitioner's remaining arguments -- as to the State Bar's waiver and prejudicial delay-- also completely lack merit.

Petitioner shows no remorse and adamantly

---

[15]The record reveals that petitioner's request for extra time to present his arguments in the Review Department was granted. He received an additional five minutes -- twice the normal allotment for oral argument.

maintains that he is completely free of any wrongdoing and that he is a mere victim "caught in the system." He also cites his lack of prior discipline as a mitigating factor warranting lesser discipline.

We agree with the State Bar Court's recommendation of disbarment and find it amply warranted by the egregious nature of petitioner's conduct and the need to protect the public from further injury.

Accordingly, we hereby adopt the State Bar Court's recommended discipline: It is ordered that petitioner be disbarred from the practice of law, that his name be stricken from the roll of attorneys, and that he comply with the provisions of rule 955 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of this order. This order is effective 30 days after the filing of this opinion.

ROSENTHAL v. STATE BAR OF CALIF.

L.A. 32260

COUNSEL FOR PARTIES:

FOR PETITIONER: Jerome B. Rosenthal
6535 Wilshire Blvd. #800
Los Angeles, CA 90048
(213) 658-6411

FOR RESPONDENT: Richard J. Zanassi
State Bar of California
555 Franklin Street
San Francisco, CA 94102
(415) 561-8200

* * *

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1896

In The

Supreme Court of the United States

October Term, 1987

JEROME B. ROSENTHAL,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from
the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

DIANE C. YU
TRUITT A. RICHEY, JR.*
RICHARD J. ZANASSI
Attorneys at Law
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Appellee

*Counsel of Record

QUESTIONS PRESENTED

1. Are the notice of appeal and docketing of appeal in this case timely in that:

   a. The Supreme Court of the State of California issued its order denying Appellant's Petition for Rehearing on September 2, 1987;

   b. There were no votes to grant a rehearing;

   c. If for any reason that order should be found to be ineffective, the Petition for Rehearing was deemed denied by operation of California law on September 11, 1987; and

   d. Appellant's Notice of Appeal was not received by the Clerk of the California Supreme Court until

if now docketed, was not docketed until some time after May 16, 1988.

2. If the Notice of Appeal is deemed timely, was the Supreme Court of California justified in disbarring petitioner based on a record established during eighty days of hearing before the State Bar Court, and independent review of that record by the Supreme Court of California, in which Appellant was found culpable of 13 separate counts of misconduct, including (a) engaging in transactions rife with undisclosed conflicts of interest; (b) taking positions adverse to former clients; (c) overstating expenses and double-billing for legal fees; (d) failing to return client files or to provide access to records; (e) failing to give adequate legal advice or to provide his clients with the opportunity to obtain independent counsel when there was an

obvious conflict of interest; (f) filing fraudulent claims and giving false testimony; and (g) engaging in conduct intended to harass his former clients, delay court proceedings, obstruct justice and abuse the legal process.

3. Were Appellant's federal constitutional rights violated by the admission into evidence of the record of various civil proceedings in which Appellant was either a party or a person upon whose behalf the litigation was presented when:

a. The factual issues were the same in both the civil and the State Bar disciplinary proceedings;

b. Petitioner asked for and received at least one stay of the State Bar proceedings on the ground that issues in the State Bar proceeding arose out of the same facts as the civil action;

c. Appellant was afforded full opportunity and had strong motivation to and, in fact, did confront and cross-examine all the witnesses in those civil proceedings;

d. All the civil actions resulted in judgments unfavorable to Appellant and one resulted in a judgment against Appellant and his cohorts for over $26,000,000 in damages, including $1,000,000 in punitive damages assessed against petitioner personally, and findings that petitioner's conduct included breaches of fiduciary duty, fraud and abuse of process?

4. Was Appellant afforded a fair hearing before The State Bar of California and before the California Supreme Court?

SUBJECT INDEX

	Pages
QUESTIONS PRESENTED	i-v
I. STATEMENT OF THE CASE	2-12
II. ARGUMENT	12-37
A. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND THAT IT IS NOT TIMELY	12-20
B. THE CALIFORNIA SUPREME COURT'S ORDER DISBARRING APPELLANT WAS PROPER AND JUSTIFIED BY THE RECORD	20-23
C. APPELLANT'S CONSTITUTIONAL RIGHTS WERE SCRUPULOUSLY PROTECTED, BOTH IN THE STATE BAR PROCEEDINGS AND BEFORE THE CALIFORNIA SUPREME COURT	23-29
D. APPELLANT WAS PROVIDED A FAIR HEARING BEFORE THE STATE BAR OF CALIFORNIA AND BEFORE THE CALIFORNIA SUPREME COURT	29-33
E. APPELLANT'S CONTENTIONS	33-37
1. California Business and Professions Code Section 6083(c)	33-36

SUBJECT INDEX
(Continued)

		Pages
2.	The Question of Delay	36
3.	The Question of Bias or Improper Conduct	36-37
III.	CONCLUSION	38

TABLE OF AUTHORITIES

Pages

Cases

Alberton v. State Bar, 37 Cal.3d 1, 206 Cal.Rptr. 373, 686 P.2d 1177 (1984) 21

Bradpiece v. State Bar, 10 Cal.3d 742, 111 Cal.Rptr. 905, 518 P.2d 337 (1974) 34

Caldwell v. State Bar, 13 Cal.3d 488, 119 Cal.Rptr. 217, 531 P.2d 785 (1975) 28,29

Dallas Cabana, Inc. v. Collier, 469 F.2d 606 (5th Cir. 1972) 9

Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985) 4,9

Department of Banking, State of Nebraska v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) 17

Doanbuy Lease & Co. v. Melcher, 448 P.2d 334 (1972) 9

Eschwig v. State Bar, 1 Cal.3d 8, 81 Cal.Rptr. 352, 459 P.2d 904 (1969) 29,34

FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 254 (1952) 16,18

TABLE OF AUTHORITIES
(Continued)

	Pages
Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400 (1959)	24
Lee v. State Bar, 2 Cal.2d 927, 88 Cal.Rptr. 361, 472 P.2d 449 (1970)	29
Magee v. State Bar, 58 Cal.2d 423, 24 Cal.Rptr. 839, 374 P.2d 807 (1962)	23
Midoff v. State Bar, 71 Cal.2d 535, 78 Cal.Rptr. 696, 455 P.2d 800 (1969)	34
Murchison, In re, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)	29
Rosenthal v. State Bar, 43 Cal.3d 612, 238 Cal.Rptr. 377, 738 P.2d 723 (1987) reh'g. denied Sept., 1987	2,4,5, 6,7,8, 9,10,13, 21,22,27, 28,35,36, 37
Samet v. Day, Los Angeles Superior Court No. 938 682	4,21,36
Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957)	23-24

TABLE OF AUTHORITIES
(Continued)

	Pages
Smith v. State Bar, 38 Cal.3d 525, 213 Cal.Rptr. 326, 698 P.2d 139 (1985)	35
Vaughn v. State Bar, 6 Cal.3d 847, 100 Cal.Rptr. 713, 494 P.2d 1257 (1972)	34
Waysman v. State Bar, 41 Cal.3d 452, 224 Cal.Rptr. 101, 714 P.2d 1239 (1987)	20,21
Wilner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175 (1963)	24,25,29, 30,31,32
Yokozeki v. State Bar, 11 Cal.3d 426, 113 Cal.Rptr. 602, 521 P.2d 858 (1974)	20,28,29

Statutes

United States Code	
Title 28, Section 2101(c)	19,20
Title 28, Section 2102	12
California Business and Professions Code	
Section 6049.2	5,6, 25-26
Section 6083(c)	33
Section 6086	3

TABLE OF AUTHORITIES
(Continued)

	Pages
Rules	
Rules of the Supreme Court of the United States	
Rule 11	20
Rule 11.2	12,19
Rule 11.3	13,19
Rule 12	20
Rule 12.1	13,19
California Civil and Criminal Court Rules	
Volume 23, Part 2 (West, 1986)	3
California Rules of Court	
Rule 24(a)	14
Rule 27(e)	15

No. 87-1896

In The
Supreme Court of the United States

October Term 1987

JEROME B. ROSENTHAL,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of California on the ground that it is manifest that the appeal is not taken in conformity with statute or with Supreme Court rules and, even if found to conform to statute and rules, the questions on which the decision of the lower court depends are so

unsubstantial as to not to need further argument.

I

STATEMENT OF THE CASE

This is a direct appeal from the judgment of the Supreme Court of California disbarring Jerome B. Rosenthal ("Appellant"). Rosenthal v. State Bar, 43 Cal.3d 612, 238 Cal.Rptr. 377, 738 P.2d 723 (1987) reh'g. denied Sept., 1987. (Appellant's Supplemental Appendix.) The California Supreme Court adopted the discipline unanimously recommended by the State Bar Court and the Review Department of The State Bar of California ("Review Department"). Id. at 636.

State Bar Proceedings

Investigation of the complaint of Doris Day Melcher and her son, Terrence Paul Melcher ("Melchers") against Appellant began in September 1971. Appellant was formally

noticed of the complaint against him in February 1972. He answered in April 1972. In October 1972, the Hearing Panel of The State Bar of California ("Hearing Panel") issued a 14-count Notice to Show Cause in Appellant's case.[1] Appellant's Appendix 2. The Notice to Show Cause was served on Appellant in January 1973, and Appellant answered the Notice in March 1973. Following a series of continuations requested by Appellant, procedural motions of Appellant, and the granting of his

---

[1] In California, the State Bar Court consists of numerous local hearing panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel decision. The ultimate decision or recommendation of the State Bar is made by the Review Department. Cal. Bus. & Prof. Code § 6086; Rules of Procedure of The State Bar of California printed in Cal. Civ. & Crim. Court Rules, vol. 23, part 2, pp. 290-323 (West, 1986).

request that the State Bar proceedings be stayed pending the resolution of the underlying civil suit arising out of the same facts as those recited in the Notice to Show Cause,[2] formal hearings before the Hearing Panel finally began on November 6, 1974.

Between November 1974 and March 1976, Appellant raised several preliminary issues which delayed the commencement of the

---

2 Samet v. Day, Los Angeles Super. Ct. No. 938 682, an action initiated by appellant, was consolidated with 12 other actions to which appellant was a party. The trial court entered judgment against appellant for legal malpractice, breach of fiduciary duty, fraud and abuse of process and awarded appellant's former clients over $26,000,000 in compensatory damages, including $1,000,000 in punitive damages against appellant personally. The decision against appellant was announced to the Hearing Panel on September 18, 1974. See Rosenthal v. State Bar, supra, n. 4 at 617. Petitioner appealed and the trial court's decision was unanimously affirmed. Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985) reh'g denied Sept., 1985. The California Supreme Court declined to review on October 16, 1985.

evidentiary hearings. Rosenthal v. State Bar, supra, 43 Cal.3d at 617.

In March or April 1976, The State Bar of California ("State Bar") elected to present its case through written materials previously the subject of civil, bankruptcy, probate and tax proceedings between Appellant and the Melchers, pursuant to California Business and Professions Code section 6049.2.[3]

---

[3] Business and Professions Code section 6049.2 provides,

> In all disciplinary proceedings . . . the testimony of a witness given in a contested civil action or special proceeding to which the person complained against is a party, or in whose behalf the action or proceeding is prosecuted or defended, may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the nonavailability of the witness; provided, the board . . . may decline to receive in evidence any such transcript of testimony . . . when it appears that the testimony was given

(continued...)

Between April 1976 and July 1977, hearings were taken up with Appellant's objections to admission of the transcripts and contentions of bias of the trial court. See Rosenthal v. State Bar, supra, 43 Cal.3d at 617-618. In July 1977, the transcripts were admitted for the limited purpose of determining whether Appellant had been afforded full opportunity to cross-examine witnesses in the civil proceedings pursuant to section 6049.2.

In April 1978, the Hearing Panel specially found that Appellant had been provided full opportunity to cross-examine those witnesses and the State Bar was permitted to introduce the testimony of those witnesses, so far as relevant and

---

[3](...continued)
under circumstances that did not require or allow an opportunity for full cross-examination.

Cal. Bus. & Prof. Code, § 6049.2.

material to the issues of the State Bar proceedings. See discussion, infra, at Argument, p. 23.

Presentation of the State Bar's evidentiary case, in the face of continuous objections by Appellant at each attempt to introduce evidence and delayed by various continuances requested by Appellant, concluded in June 1979. Rosenthal v. State Bar. supra, 43 Cal.3d at 618-619.

At that point, Appellant was directed to present his defense. He chose to use the hearings between June 1979 and the summer of 1980 to re-open issues fully argued and decided previously.[4] Finally, in 1980, Appellant began his formal defense, which consisted mainly of his own testimony, supplemented with the testimony of his law

---

[4] By November 1979, the Hearing Panel was "imploring" Appellant to present evidence in his defense. See Rosenthal v. State Bar, supra, 43 Cal.3d at 619, especially at n. 9.

firm's accountant, lawyers who had represented him in the civil proceedings, his ex-wife, a long-time friend (coincidentally a disbarred attorney), and a data processing service operator. See Rosenthal v. State Bar, supra, 43 Cal.3d at 619-620.

The formal hearings were concluded on August 16, 1984.

Appellant's Conduct

The State Bar proceedings against Appellant arose out of his 18-year relationship with Doris Day Melcher and her husband, Martin Melcher. Beginning in 1956, Appellant served as Mr. and Mrs. Melcher's ("Clients") attorney and in various other capacities, including business and financial advisor. In addition, Appellant represented several corporations in which Clients held an interest. Appellant also represented Terrence Melcher, their 26-year old son,

whom Appellant had arranged to have appointed administrator of Martin Melcher's estate for a brief period in 1968. The relationship between the Melchers and Appellant ended shortly after the death of Martin Melcher, when the Melchers terminated Appellant's representation in May 1968. Thereafter, the Melchers and Appellant were engaged in litigation based upon Appellant's long-term and multifarious abuse of his previous association with Clients.[5]

---

[5] Included are the 13 separate suits consolidated in Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985); Dallas Cabana, Inc. v. Collier, 469 F.2d 606 (5th Cir. 1972); and Doanbuy Lease & Co. v. Melcher, 448 P.2d 334 (1971). At one point in the history of the Melcher/Rosenthal litigation, 18 lawsuits were pending in five jurisdictions, from Oklahoma to California. Day v. Rosenthal, supra, 170 Cal.App.3d at 1134. Of the 13 consolidated in California, 10 had been initiated by appellant against his former clients. That same pattern of filings in other jurisdictions led the court in Rosenthal v. State Bar to comment, "He skillfully and with malice abused the process of the courts to harass his former

(continued...)

Appellant's misconduct, peripheral to the issues considered by this Court, demonstrated in a record which is the product of 80 days of hearing, and set forth in the California Supreme Court's opinion in Rosenthal v. State Bar, supra, 43 Cal.3d 612, may be briefly summarized: In conjunction with his legal representation of Clients, Appellant made large investments of their money in ventures in which Appellant had a personal interest and which ventures Appellant knew or should have known were in poor financial condition or were unwise investments,[6] but provided no protection for Clients relative to these investments. The court concluded that Appellant (1) engaged

---

[5](...continued)
clients." 43 Cal.3d at 631.

[6] Among these ventures were Dallas Cabana Hotel, Inc., Palo Alto Cabana Hotel, Inc. Doanbuy Lease & Company, Inc.

in transactions rife with undisclosed conflicts of interest; (2) overstated expenses and double-billed for legal fees; and (3) failed to give adequate legal advice or to provide Clients with the opportunity to obtain independent counsel; all to the financial detriment of Clients.

After the Melchers discharged Appellant in 1968, Appellant (1) refused to return their files and records, necessitating the court appointment of a receiver and the sheriff's physical presence for the Melchers to ultimately secure the files and records; (2) filed fraudulent claims and gave false testimony in the bankruptcy proceeding of Dallas Cabana Hotel, causing significant loss to the bankruptcy estate; (3) filed numerous lawsuits against the Melchers, with the purpose of harassing them and obstructing justice. The court concluded that Appellant did everything possible to

delay court proceedings, obstruct justice and abuse the legal process.

II

ARGUMENT

A. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND THAT IT IS NOT TIMELY

"An appeal . . . shall be in time when the notice of appeal . . . is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U.S.C. §§ 2101(a), (b), and (c)." Rule 11.2, Rules of the Supreme Court of the United States.

"Any . . . appeal intended to bring any judgment or decree in a . . . proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . ." 28 U.S.C., § 2102(c).

"Not more than 90 days after the entry of the judgment appealed from, it shall be

the duty of the Appellant to docket the case . . . ." Rule 12.1, Rules of the Supreme Court of the United States.

"[T]he time for filing the notice of appeal . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment." Rule 11.3, Rules of the Supreme Court of the United States.

On July 13, 1987, the Supreme Court of California issued an opinion in Appellant's case, ordering his disbarment. Rosenthal v. State Bar, supra, 43 Cal.3d at 636.

On August 6, 1987, the Supreme Court of the California extended the time for granting or denying rehearing in Appellant's case until September 11, 1987, pursuant to

California Rule of Court 24(a).[7]

Appellant's Appendix 7.

On September 2, 1987, Appellant's Petition for Rehearing was denied by the court. Appellant's Appendix 8. The order denying rehearing was signed by Malcolm Lucas, Chief Justice of the Supreme Court of California.[8]

On September 11, 1987, by operation of California law, the California Supreme Court's jurisdiction to rehear Appellant's appeal under the August 6 extension lapsed, and the petition for rehearing was deemed

---

[7] Rule 24(a) provides, "A decision of the Supreme Court becomes final 30 days after filing unless the court . . . prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days . . . ." Cal. Rules of Court, rule 24(a).

[8] Chief Justice Lucas had recused himself from this case on April 29, 1987. Appellant's Appendix 6.

denied pursuant to California Rule of Court 27(e).[9]

On February 18, 1988, the Supreme Court of California, per Acting Chief Justice Arguello, issued an order making clear that the petition for rehearing had been finally denied on either September 2, 1987 via the California Supreme Court Order of that date signed by Chief Justice Lucas (there were no votes for rehearing) or, in the event that that order was ineffective because of the previous recusal of Chief Justice Lucas, on September 11, 1988 by operation of California law. Rule 27(e), supra; Appellant's Appendix 3.

Although petitions for rehearing, while pending, generally suspend the finality of a

---

[9] Rule 27(e) provides, "If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied . . . ." Cal. Rules of Court, rule 27(e).

judgment, in this case the petition for rehearing was no longer pending as of September 2, 1987, and certainly not after September 11, 1987.

"The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which . . . had been plainly and properly settled with finality." FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 73 S.Ct. 245, 249, 97 L.Ed. 254 (1952). "[T]he mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which the review must be sought." Id. at 248.

"For the purpose of the finality which is a prerequisite of review in this Court, the test is . . . whether the record shows that the order of the . . . court has in fact fully adjudicated rights and that that

adjudication is not subject to further review by a State Court." Department of Banking, State of Nebraska v. Pink, 317 U.S. 264, 63 S.Ct. 233, 235, 87 L.Ed. 254 (1942) (per curiam).

Appellant's Petition for Rehearing was denied, at the latest, on September 11, 1987. There was no doubt of the decision of the court in that regard, "[N]o votes to rehear the matter were cast." Appellant's Appendix 3. The subsequent order did not disturb or alter Appellant's legal rights, because that order simply restated, without modification, the court's decision not to rehear Appellant's case. Appellant's Appendix 3.

Appellant here was given full notice, first on September 2, 1987, with the Order Denying Hearing and, second, at the expiration of the August 6 extension on September 11, 1987, that his petition for

rehearing had been denied by the California Supreme Court. No question as to whether the California Supreme Court was going to alter its adjudication of Appellant's rights remained after September 11, 1987. If Appellant had any such doubts, he never expressed them to the court.

Further, this case seems particularly fitting for the application of the principle "that litigation must at some definite point be brought to an end." FTC v. Minneapolis-Honeywell Regulator Co., supra, at 429. The apparently infinite panoply of dilatory tactics Appellant has chosen to use in both the numerous civil actions and the 12 years of proceedings before the State Bar have failed to result in any findings favorable to Appellant. Appellant's contentions have been litigated in the court systems of at least three states, with appeals of each ruling against Appellant

resulting in affirmation of the lower courts' judgments. Appellant has appealed the recommendation of disbarment of the State Bar to the court of last resort in California. That court rendered its judgment of disbarment. That court denied rehearing at the latest on September 11, 1987.

United States Supreme Court rules 11.2, 11.3 and 12.1 and 28 United States Code section 2101(c) require that the appeal in this matter be filed 90 days from the denial of rehearing. Ninety days from September 2, 1987 ran on December 1, 1987. Ninety days from September 11, 1987 ran on December 10, 1987. Appellant filed a Notice of Appeal to the Supreme Court of the United States on February 28, 1988. Thus, Appellant's Notice of Appeal of February 28, 1988 and the docketing of his appeal, if now

accomplished (sometime after May 16, 1988), are not timely.

Appellant's appeal should be dismissed for lack of jurisdiction of this Court on the ground that the appeal is not taken in conformity with rules 11 and 12 of the Supreme Court of the United States, or with 28 United States Code section 2101(c).

B. THE CALIFORNIA SUPREME COURT'S ORDER DISBARRING APPELLANT WAS PROPER AND JUSTIFIED BY THE RECORD

In California, the Supreme Court of the State of California has the final authority to determine the appropriate discipline to be imposed upon attorneys charged in State Bar disciplinary proceedings. Waysman v. State Bar, 41 Cal.3d 452, 456, 224 Cal.Rptr. 101, 714 P.2d 1239 (1987); Yokozeki v. State Bar, 11 Cal.3d 426, 450, 113 Cal.Rptr. 602, 521 P.2d 858 (1974).

The California Supreme Court, in independent review, must weigh and pass on

the sufficiency of the evidence. Waysman v. State Bar, supra, 41 Cal.3d at 456; Alberton v. State Bar, 37 Cal.3d 1, 11, 206 Cal.Rptr. 373, 686 P.2d 1177 (1984).

The independent review of Appellant's case by the California Supreme Court revealed, in its words, "[P]etitioner's (Appellant herein) arguments [to be] completely meritless." Rosenthal v. State Bar, supra, 43 Cal.3d at 633. The court cites Appellant's "lack of a meritorious defense." Id. at 636; emphasis in original. The court found disbarment "amply warranted by the egregious nature of [Appellant's] conduct and the need to protect the public from further injury." Id. at 636.

The Samet v. Day trial court found that the Clients were "neither sophisticated investors nor experienced in business affairs and were dependent on [Appellant] for legal and business advice, and

susceptible to his influence."[10] Rosenthal v. State Bar, supra, 43 Cal.3d at 621. California policy as to the duty an attorney owes his clients is high. "An attorney's duty of fidelity to his client involves far more than refraining from exercising undue influence . . . . [A]ll business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney's part . . . especially where there is great intellectual inequality, and

---

10 In his jurisdictional statement, appellant depicts his relationship with the Melchers as carrying out the "brilliant and prophetic planning of Martin Melcher consistent with his 'empire plan' . . . ." Appellant's Jurisdictional Statement, p. 16. In asking the court to view appellant's actions as loyally carrying out the directives of his clients, it is notable that appellant relies upon Martin Melcher to corroborate his version of the circumstances of his representation. Mr. Melcher, who died in 1968, is the single Melcher witness unavailable to refute appellant's contentions.

comparative inexperience on the part of the [client]." Magee v. State Bar, 58 Cal.2d 423, 430-431, 24 Cal.Rptr. 839, 374 P.2d 807 (1962). Here just such relationship existed between Appellant and Clients. The record demonstrates the abuse which Appellant practiced upon Clients and to his own benefit.

In light of the record in the State Bar proceedings and in the underlying civil litigation, the California Supreme Court acted properly and was entirely justified in ordering Appellant's disbarment.

C. APPELLANT'S CONSTITUTIONAL RIGHTS WERE SCRUPULOUSLY PROTECTED, BOTHIN THE STATE BAR PROCEEDINGS AND BEFORE THE CALIFORNIA SUPREME COURT

"A State cannot exclude a person from the practice of law . . . in a manner or for reasons which contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 756,

1 L.Ed.2d 796 (1957). "[P]rocedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." Wilner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 1180 (1963); Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 1419-1420 (1959).

However, "this does not mean that in every case confrontation and cross-examination are automatically required . . . . The circumstances will determine the necessary limits and incidents implicit in the concept . . . ." Wilner, supra, 83 S.Ct. at 1182.

Here Appellant, an experienced attorney, had the opportunity and strong motivation to cross-examine the witnesses whose testimony was used as evidence in the State Bar proceedings. The transcripts themselves indicate that Appellant took full

advantage of that right in each of the proceedings. We submit that admission of this evidence violated no constitutional right of Appellant, and he has pointed to no authority to the contrary.

Appellant was afforded procedural due process in the State Bar disciplinary proceedings and before the California Supreme Court. "In reviewing state action . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." Wilner v. Committee on Character and Fitness, supra, 83 S.Ct. at 1182.

In March 1976, the State Bar Examiner announced that he would present the State Bar's case based upon written materials previously the topic of civil, probate, bankruptcy and tax proceedings between Appellant and the Melchers, pursuant to section 6049.2 of the California Business

and Professions Code. Nearly one and a half years were spent litigating Appellant's objections to the admission of this evidence. In July 1977, the Hearing Panel ruled that the transcripts could be admitted for the limited purpose of determining whether testimony in the civil proceedings had met the test of being given under circumstances which required or allowed an opportunity for Appellant's full cross-examination. The Hearing Panel's examination of the voluminous transcripts occupied nearly another full year, until April 1978. The unanimous Hearing Panel specially found that the testimony in the civil actions had been given under circumstances that required or allowed Appellant opportunity for full cross-examination. Not only were the transcripts painstakingly scrutinized to assure that Appellant's rights to confrontation and

cross-examination had been protected, Appellant's objections were reconsidered at each introduction of that testimony by the State Bar. Rosenthal v. State Bar. supra, 43 Cal.3d at 617-618.

Appellant was either a party to, or a person on whose behalf the civil proceedings were prosecuted or defended. They were all cases involving Appellant or Appellant's law firms or corporations which Appellant controlled. The California Supreme Court disbarring Appellant observed:

> In each proceeding, petitioner [Appellant] enjoyed a full opportunity, and had a strong motivation effectively to cross-examine adverse witnesses . . . . [H]e had, at that time, ample interest and motive in refuting any false accusations of statements . . . . [H]e cannot seriously claim a lesser motive in proving his assertions in those proceedings on behalf of himself, his corporations, and his clients, than he has in proving the same

> assertions now on behalf of his license to practice law . . . .

Rosenthal v. State Bar, supra, 43 Cal.3d at 633.

Testimony of witnesses contained in transcripts of contested civil actions are admissible as evidence in State Bar disciplinary proceedings, when the charged attorney had an opportunity to cross-examine those witnesses in the underlying civil actions pursuant to Business and Professions Code section 6049.2. Moreover, contrary to Appellant's assertions, California Business and Professions Code section 6049.1 does not exclude transcripts of underlying non-disciplinary proceedings. Yokozeki v. State Bar, supra, 11 Cal.3d at 444; Caldwell v. State Bar, 13 Cal.3d 488, 497, 119 Cal.Rptr. 217, 531 P.2d 785 (1975); Rosenthal v. State Bar, supra, 43 Cal.3d, n. 11 at 622. When the issues in the civil actions and the disciplinary proceedings are

factually identical, California law provides that not only the transcripts but the entire record, including findings and decisions in those civil matters, may be considered in the disciplinary proceeding. Lee v. State Bar, 2 Cal.2d 927, 940-941, 88 Cal.Rptr. 361, 472 P.2d 449 (1970); Eschwig v. State Bar, 1 Cal.3d 8, 18, 81 Cal.Rptr. 352, 459 P.2d 904 (1969); Yokozeki v. State Bar, supra, 11 Cal.3d at 444; Caldwell v. State Bar, supra, 13 Cal.3d at 497. Appellant has presented no authority showing that this practice violates any federal constitutional right.

D. APPELLANT WAS PROVIDED A FAIR HEARING BEFORE THE STATE BAR OF CALIFORNIA AND BEFORE THE CALIFORNIA SUPREME COURT

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). In Wilner, supra, an attorney was denied admission to the bar

of the State of New York because he failed to satisfy the character and general fitness requirements of that state. This Court found that Wilner had been denied procedural due process when he was denied admission without a hearing on accusations asserted against him. Wilner v. Committee on Character and Fitness, supra, 93 S.Ct. at 1181.

Justice Goldberg, joined in his concurring opinion in Wilner by Justices Brennan and Stewart, stated:

> The constitutional requirements . . . may be simply stated: in all cases in which admission to the bar is to be denied . . . the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence . . . ."

Id. at 1182.

Setting out further detail, Wilner continues:

> The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. Thus, for example, when the derogatory matter . . . is of an undisputed documentary character disclosed to [Appellant], and it is plain and uncontradicted that the committee's recommendation is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the [Appellant] has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain.

Id. at 1182.

Appellant's case differs from Wilner in that it is an action for disbarment and Appellant had protracted hearings before the Hearing Panel, an appearance before the Review Department, and written briefings and oral argument before the California Supreme Court in which to reply and explain.

However, the principles stated in Wilner apply.

Appellant was before the Hearing Panel for 80 days of hearing. Every one of his considerable number of objections, motions and requests for continuances and stays was fully deliberated. As the evidence presented against him was written material from various civil proceedings at which he had been present, he certainly was informed of the factual basis of the State Bar's case. Appellant was given adequate opportunity to review and explain that material during the disciplinary proceedings.

Appellant was given special treatment by the Review Department. He requested and was granted permission to tape record oral argument.[11] He requested and was given

---

11 Appellant even abused this unusual privilege, by "accidentally" leaving his (continued...)

twice the customarily allotted time to present his oral argument.

E. APPELLANT'S CONTENTIONS

1. California Business and Professions Code Section 6083(c)

Section 6083, subsection (c) of the California Business and Professions Code provides that the burden of showing that the Review Department's recommendation is erroneous or unlawful is upon the attorney before the California Supreme Court for review. Appellant claims this is unconstitutional. However, Supreme Court review only follows proceedings before the State Bar Court in which the burden of showing culpability rests with the State Bar to prove by evidence sustaining clear and convincing proof to a reasonable certainty.

---

[11](...continued)
recorder running during the closed executive session that the Review Department held to decide the question of appellant's taping of oral argument.

Vaughn v. State Bar, 6 Cal.3d 847, 852, 100 Cal.Rptr. 713, 494 P.2d 1257 (1972); Midoff v. State Bar, 71 Cal.2d 535, 550, 78 Cal.Rptr. 696, 455 P.2d 800 (1969). Moreover, the purpose of proceedings for attorney discipline is not to punish, but rather to protect clients, the public and the profession of law, and to determine the fitness of an attorney to practice law in California. Bradpiece v. State Bar, 10 Cal.3d 742, 748, 111 Cal.Rptr. 905, 518 P.2d 337 (1974). Because the essence of the proceedings is not punitive, the rules of criminal procedure do not apply.[12] Eschwig v. State Bar, supra, 1 Cal.3d at 18.

It is a part of California policy regulating the practice of law to give

---

12 Likewise, appellant's contention that a "beyond a reasonable doubt" standard of proof is appropriate in bar disciplinary proceedings is incorrect.

great weight to determinations of the State Bar in the Supreme Court's independent review. In keeping with that policy, the burden of demonstrating to the Supreme Court the error or illegality of the Review Department's recommendations rests upon Appellant.

Appellant's only due process entitlement is a "fair hearing." Smith v. State Bar, 38 Cal.3d 525, 532, 213 Cal.Rptr. 326, 698 P.2d 139 (1985); Rosenthal v. State Bar, supra, 43 Cal.3d at 634. Appellant was provided with a fair hearing.

Appellant failed to demonstrate to the California Supreme Court, in its independent review of the record, that the unanimous decisions of the Hearing Panel and Review Department were erroneous or unlawful. Rather, the court found "[p]etitioner's arguments completely meritless" and his defense "devoid of any sincere discussion of

the merits and serious findings against him." Further, the California Supreme Court pointed out Appellant's brief was devoid of citations to support claims or attacks upon the truth of the State Bar Court's findings and conclusions beyond Appellant's assertions that he was guilty of "no wrongdoing whatsoever." Rosenthal v. State Bar, supra, 43 Cal.3d at 632-634. His arguments to this Court are essentially in that same vein.

2. The Question of Delay

Appellant has contended before this Court and at each stage in the proceedings that he has been prejudiced by delay. In this case, most of the delay was the result of Appellant's request for stay because of the pendency of Samet v. Day, supra, or Appellant's own dilatory tactics.

3. The Question of Bias or Improper Conduct

Appellant's Jurisdictional Statement charges misconduct by the various bodies which have heard his case. He accuses the California Supreme Court of deliberate misconstruction of the record, and imputes to the State Bar Examiner misrepresentation and concealment of the truth. Appellant's Jurisdictional Statement, pp. xii, xv. This contention is typical of the manner in which Appellant has responded to the charges against him. Rather than present any positive evidence in his defense, he has maintained a barrage of procedural and accusatory offensive tactics. See Rosenthal v. State Bar, supra, 43 Cal.3d at 632-634. Courts in other states found the same modus in Appellant's behavior. See Rosenthal v. State Bar, supra, 43 Cal.3d at 625, 626, 630.

III

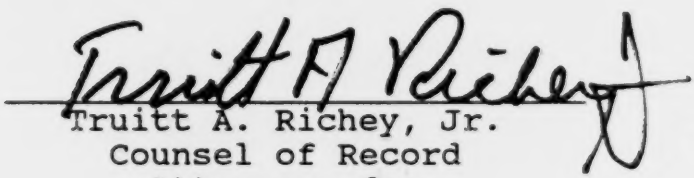
CONCLUSION

The decision and order of the Supreme Court of the State of California was reached in accord with the constitutional principles established by this Court.

The appeal filed herein should be dismissed for failure of timeliness. The opinion of the California Supreme Court should be affirmed.

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Richard J. Zanassi



Truitt A. Richey, Jr.
Counsel of Record
Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On June 30, 1988, I served the within

MOTION TO DISMISS OR AFFIRM

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Boulevard
Los Angeles, California 90058

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 30th day of June, 1988 at San Francisco, California.

Chiyeko Kimura

Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1896

In The

Supreme Court of the United States

October Term, 1987

JEROME B. ROSENTHAL,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA,
Appellee,

On Appeal from
the Supreme Court of California

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

(Rule 16.5)

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Boulevard
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673

Appellant, Pro Se

TABLE OF CONTENTS

		Page
I.	MOTION TO DISMISS OR AFFIRM IS UNTIMELY	1
	1. LAST DOCUMENT RULE	2
	2. MAY 18 DATE CANNOT BE EXTENDED BY THE "LAST DOCUMENT RULE"	2
	3. MOTION IS TOTALLY DEFECTIVE	3
II.	APPELLEE'S "STATEMENT OF THE CASE" IS MISLEADING, INACCURATE AND DECEIVING	4
III.	CALIFORNIA SUPREME COURT'S LAST DENIAL OF REHEARING ON FEB. 18, 1988 IS CONTROLLING; THIS APPEAL IS TIMELY	6
IV.	MOTION'S ARGUMENTS, PAGES 20-32, IGNORE QUESTIONS IN JURISDICTIONAL STATEMENT, AND ADDRESS STATE QUESTIONS ONLY	8
V.	MOTION SPURIOUSLY RECASTS APPELLANT'S ATTACK ON STATUTE WHICH SHIFTS TO ACCUSED (APPELLANT) BURDEN OF DISPROVING STATUTORILY-PRESUMED WRONGDOING, AND DECEPTIVELY CONCEALS WELL-ESTABLISHED FACT-FINDING ROLE OF CAL. SUPREME COURT	9
CONCLUSION		10
LIST OF APPENDICES		11
APPENDICES		see following page

TABLE OF AUTHORITIES

	Page(s)
Cardona v. Quinones (1916) 240 U. S. 83	7
Davis vs. Wechsler (1923) 262 U. S. 22	7
Dept. of Banking vs. Pink (1942) 317 U. S. 264, 63 S. Ct. 233, 235	6
FTC vs. Minneapolis-Honeywell (1952) 344 U.S. 206, 73 S. Ct. 245, 249	6
Herrscher vs. State Bar (1935) 4 C.2d 399, 401, 49, P.2d 832	9
U. S. vs. Gomez (1865) 70 S. Ct. (Wall) 752	7
RULES - U.S. SUPREME COURT	
16	1,2,3
16.1	3
16.2	2,3
28	4
28.2	3
28.5(a)	4
28.5(b)	4
28.5(c)	4
42.3	4

No. 87-1896

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

I

MOTION TO DISMISS OR AFFIRM IS UNTIMELY

Rule 16 states, in relevant part:

> ".1. Within 30 days after receipt of the jurisdictional statement,..., the Appellee may file a motion to dismiss, or a motion to affirm...."

Appellee's "Motion to Dismiss or Affirm" (herein "Motion") was received for filing no sooner than July 8, 1988, as will appear below in Par. 3 of this Section I.

1. "LAST DOCUMENT RULE"

Jurisdictional Statement was filed May 13, 1988; completed May 18, 1988. (App. 1.)

Rule 16.2 provides:

"The Clerk shall not accept a motion...that does not comply with this Rule...."

Motion is out of time; latest time expired June 18, 1988, and must be rejected.

2. May 18 date cannot be extended by the "last document rule." Here, the last filing, June 2, 1988, was merely the Opinion below, (App. 2-A) filed in Court below July 13, 1987 (App. 2-B), copy served on Appellee by Court below, on July 13, 1987 (App. 2-C). The purpose of the "last document rule" is to insure that party moving to dismiss is fully informed of all matters comprising the Jurisdictional Statement (herein "J.S.") before time for motion starts to run under Rule 16. Appellee had a copy of the Opinion below since July 1987. There was nothing "new" that Appellee learned by its receipt of "Supplemental Appendix" (App. 2-A) in June,

1988-it was the identical document as the one received July 1987.Thus, Appellee's Rule 16 time commenced when Appellee received App. 1 (May 18, 1988 filing),and expired no later than June 18-20, 1988 (App. 3).The Motion,filed June 30/July, 1988 is too late. Rule 16.2.

3. Motion is Totally Defective

First, Appellant received in the mail from San Francisco on July 8, 1988; and was so stamped in regular course of business.(Apps. 4 and 4A.) A fortiori, the Motion if mailed to Court (Washington, D.C.) when and as mailed to Appellant (Los Angeles) could not reach Court sooner than it reached Appellant (7/7/88).

Second, since July 8 filing is per se "out of time" [even assuming, arguendo, that June 2 is start of the 30-day period (Rule 16.1)], Appellee violated Rule 28.2 by not filing a "notarized statement by a member of the Bar of this Court"..."stating that to his knowledge the mailing (to this Court) took place on a

particular date within the permitted time." The required affidavit (notarized statement) exists nowhere on the record.

Third, there is no compliance with any of Rules 28.5(a), (b) or (c) or 42.3. "Declaration" appearing after page 38 of Motion is not "affidavit" required by Rule 28.5(c), Rule 42.3, and Rule 28. Thus, since Motion is either too late, void for non-compliance with Rules, or both, it is unnecessary to consider pages 2-38; if Court agrees, it is also unnecessary to consider the following portion of this brief opposing Motion, except for CONCLUSION.

II

APPELLEE'S "STATEMENT OF THE CASE" IS MISLEADING, INACCURATE AND DECEIVING

References below are to the Motion; comments, e.g. "should read" means inconsistent material, presently in Motion, should be deleted.

(a) Page 2 should read: "rehearing denied, Feb. 18, 1988" (App. No. 1).

(b) Page 2 under "State Bar Proceedings", the Complaint was filed in Dec. 1968.

(c) Pages 3 and 4: No delay (except minuscule sick days) attributable to Appellant, excluding attempts to procure appointment of counsel, and for constitutional attacks on California statutes or their application. J.S., pp. 27-32.

(d) Page 6 should read: "...transcripts were initially admitted for limited purpose; later all transcripts admitted for all purposes, over objections on constitutional grounds."

(e) Pages 6, 7 should read: "No evidence before Hearing Panel of full opportunity to cross-examine; only evidence before Panel was uncontradicted testimony to the exact opposite." Fn. 4, p. 7, should read "Appellant was prevented from presenting evidence in his defense by Committee-caused delays and its false promises."

(f) Pages 8-11 should be deleted entirely,

as not responsive to any of the Questions in J.S., all federal and substantial. Those pages are excerpts from and references to Opinions and expressions from extraneous civil proceedings, from Appellee's briefs of state questions in state tribunals, from administrative recommendations, and from Opinion below. Those pages are an irrelevant and meaningless "red herring."

III

CALIFORNIA SUPREME COURT'S LAST DENIAL OF REHEARING ON FEB. 18, 1988 IS CONTROLLING; THIS APPEAL IS TIMELY

1. Appellee's reliance on FTC vs. Minneapolis-Honeywell (1952) 344 U.S. 206, 73 S. Ct. 245, 249, and on Dept. of Banking vs. Pink (1942) 317 U. S. 264, 63 S. Ct. 233, 235 is misplaced. Those cases are distinguishable from our case; they teach that a subsequent and meaningless order which does not change the "final" judgment in any significant way, will not extend the date of that final judgment. But, here, the "subsequent" (last)

Order, Cal. Supreme Court, Feb. 18, 1988 (App. 3 to J.S.) denying rehearing significantly and materially alters the legal rights as determined by earlier order (void, signed by disqualified Justice, Sept. 2, 1987) (App. 8 to J.S.) or by "expiration" of rehearing time earlier decided Aug. 6,1987 (App. 7 to J.S.). The respect in which the last Order (Feb. 18, 1988) affected Appellant's rights is that it deprives Appellant of fundamental and constitutionally derived, vested right of Appeal to this Court. Also see J.S., pp. 57-61, citing on p. 60 controlling policy of this Court, viz. **Davis vs. Wechsler** (1923) 263 U. S. 22; **Cardona vs. Quinones** (1916) 240 U. S. 83; **U. S. vs. Gomez** (1865) 70 S. Ct. (Wall) 752 [Citation incorrect, p. 60 of J.S.]

For accuracy, these corrections must be made: Appellee's statement (pp. 18, 19) that Appellant's contentions have been litigated in the Court systems of at least three states is strongly misleading. None of Appellant's

contentions **before this Court** has ever been litigated in any state outside of California. Also, Cal. Supreme Court's last (and controlling) denial of rehearing occurred on Feb. 18, 1988 and **not** on Sept. 11, 1987, as stated on p. 19 of the Motion.

IV

MOTION'S ARGUMENTS, PAGES 20-32, IGNORE QUESTIONS IN JURISDICTIONAL STATEMENT, AND ADDRESS STATE QUESTIONS ONLY

1.Pages 20-23 ("B")deal with record in Bar proceeding and underlying civil litigation, as justifying disbarment.No mention whatsoever is made concerning the 22 federal constitutional questions before this Court.

2. Pages 23-29 ("C") deal with federal generalities and conclusions, but again refer to state law principles, and never address any of the 22 questions before this Court.

3.Pages 29-32 ("D") are only observations, none of which addresses any of the specific federal questions before this court.

MOTION SPURIOUSLY RECASTS APPELLANT'S ATTACK ON STATUTE WHICH SHIFTS TO ACCUSED (APPELLANT) BURDEN OF DISPROVING STATUTORILY-PRESUMED WRONGDOING, AND DECEPTIVELY CONCEALS WELL-ESTABLISHED FACT-FINDING ROLE OF CAL. SUPREME COURT

1. In disciplinary attorney cases, the Cal. Supreme Court acts as fact-finder, de novo. That court examines the entire record, weighs the evidence and makes its independent determination. Herrscher vs. State Bar (1935) 4 C.2d 399, 401, 49 P.2d 832.

In conceding the statutory policy (burden on accused to prove innocence) the Motion's position ignores the de novo and independent fact-finding role, unquestionably established as vested in Cal. Supreme Court. The presumption of innocence is singularly applicable in Cal. Supreme Court's de novo determination of disciplinary proceedings, indisputably quasi-criminal. Herrscher vs. State Bar (1935) 4 C.2d 399, 403, 421.

2. Page 36 of Motion improperly attributes blame for 19 years' to Appellant; the opposite is true: the greatest portion of

delay was occasioned by Appellee's unconstitutionally-applied statutes, and resistance to Appellant's efforts to procure appointed counsel.

3. Again, Motion (pp. 36, 37) repeats in generalities its characterization gleaned from state bodies, and specifically ignores the federal constitutional questions now before the Court.

CONCLUSION

1. The Motion should be denied as untimely, or as defective in violation of Rules.

2. The thrust of the Motion addresses only State procedures and principles grounded on state law, thus ignoring the substantial federal constitutional questions--as though ignoring them will make them disappear.

The Court should note jurisdiction, and calendar the case for briefing and argument.

July 13, 1988.

JEROME B. ROSENTHAL
Appellant, Pro Se

LIST OF APPENDICES

LIST OF APPENDICES

No.	Description
1	Face Sheet of Jurisdictional Statement filed May 13, 1988, completed May 18, 1988
2-A	Face sheet, Supplemental Appendix to Jurisdictional Statement re: California Supreme Court "Opinion"
2-B	Face Sheet of California Supreme Court "Opinion", filed July 13, 1987
2-C	Proof of Service re: California Supreme Court "Opinion" in matter entitled Rosenthal v. State Bar of Calif., L.A. 32260
3	Affidavit of Service re: Jurisdictional Statement, dated May 17, 1988
4	Face Sheet, Appellee's Motion To Dismiss or Affirm, received by Jerome B. Rosenthal, July 8, 1988
4-A	Affidavit of Bonnie Dantzscher, dated July 13, 1988 re: receipt of Appellee's Motion to Dismiss or Affirm

APPENDIX 1

FACE SHEET OF JURISDICTIONAL
STATEMENT FILED MAY 13, 1988,
COMPLETED MAY 18, 1988

RECEIVED MAY 23 1988

RECEIVED
MAY 13 1988
OFFICE THE CLERK
SUPREME COURT, U.S.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

APPENDIX 1

APPENDIX 2-A

FACE SHEET, SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT RE: CALIFORNIA SUPREME COURT "OPINION"

No. 87-1896

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

RECEIVED
HAND DELIVERED
JUN 2 - 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

APPENDIX 2-A

APPENDIX 2-B

FACE SHEET OF CALIFORNIA SUPREME COURT

"OPINION", filed July 13, 1987

SUPREME COURT

F I L E D

JUL 13 1987

Laurence P. Gill, Clerk

Deputy

C O P Y

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JEROME B. ROSENTHAL, Petitioner,	)	
v.	)	L.A. 32260
THE STATE BAR OF CALIFORNIA, Respondent.	)	

BY THE COURT:

This is a proceeding to review the unanimous recommendation of the Review Department of the State Bar Court (Review Department)[1] that petitioner Jerome B.

[1]The phrase State Bar Court shall be used herein to refer to the conjunction of the Hearing Panel and Review Department.

* Before Broussard, J., Panelli, J., Arguelles, J., Eagleson, J., Kaufman, J., Lillie, J., ** Spencer, J.**

** Court of Appeal, Second Appellate

APPENDIX 2-C

PROOF OF SERVICE RE: CALIFORNIA SUPREME COURT "OPINION" IN MATTER ENTITLED ROSENTHAL v. STATE BAR OF CALIF., L.A. 32260

ROSENTHAL v. STATE BAR OF CALIF.

L.A. 32260

COUNSEL FOR PARTIES:

FOR PETITIONER: Jerome B. Rosenthal
6535 Wilshire Blvd. #800
Los Angeles, CA 90048
(213) 658-6411

FOR RESPONDENT: Richard J. Zanassi
State Bar of California
555 Franklin Street
San Francisco, CA 94102
(415) 561-8200

* * *

EXHIBIT 2-C

APPENDIX 3

AFFIDAVIT OF SERVICE RE: JURISDICTIONAL STATEMENT, DATED MAY 17, 1988

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JEROME B. ROSENTHAL, Appellant

v.

STATE BAR OF CALIFORNIA, Appellee

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

AFFIDAVIT OF SERVICE RE

JURISDICTIONAL STATEMENT

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Blvd.
Los Angeles, CA 90048
(213) 658-6411
(213) 276-9673
Appellant, in Pro Se

I. MICHAEL FORD, being duly sworn, aver:

1. I am the assistant and secretary to

1. I am the assistant and secretary to JEROME B. ROSENTHAL, Appellant herein. My business address is 6535 Wilshire Boulevard, Suite 800, Los Angeles, California 90048.

2. On May 17, 1988, I deposited in the U.S. Mails, first class, postage fully prepaid three copies of the Jurisdictional Statement in the above-entitled case, and mailed three copies to each of the following:

THE STATE BAR OF CALIFORNIA
1230 West Third Street
Los Angeles, California 90017

HERBERT M. ROSENTHAL
TRUITT A. RICHEY, JR.
RICHARD J. ZANASSI
THE STATE BAR OF CALIFORNIA
555 Franklin Street
San Francisco, California 94102

3. All parties required to be served herein have been thus served as above.

Executed on May 17, 1988 at Los Angeles, California

/s/ Michael Ford
Michael Ford
Affiant

On this 17th day of May 1988, there appeared before me Michael Ford, personally known to me, who signed this Affidavit as Affiant, before me this 17th day of May 1988.

/s/ Jeffrey P. Samuels
JEFFREY P. SAMUELS
Notary Public in and for the State of California, County of Los Angeles

OFFICIAL SEAL
JEFFREY P. SAMUELS
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm.Expires Aug.24,1988

APPENDIX 4

FACE SHEET, APPELLEE'S MOTION TO DISMISS OR AFFIRM, RECEIVED BY JEROME B. ROSENTHAL, JULY 8, 1988

RECEIVED JUL 8 1988

No. 87-1896

In The

Supreme Court of the United States

October Term, 1987

JEROME B. ROSENTHAL,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from
the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

DIANE C. YU
TRUITT A. RICHEY, JR.*
RICHARD J. ZANASSI
Attorneys at Law
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Appellee

*Counsel of Record

APPENDIX 4

APPENDIX 4-A

AFFIDAVIT OF BONNIE DANTZSCHER, DATED JULY 13, 1988 RE: RECEIPT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

AFFIDAVIT

I, BONNIE DANTZSCHER, being duly sworn on oath depose and say:

1. I am and for some years have been assistant and secretary to JEROME B. ROSENTHAL, the Appellant in the case now pending in the Supreme Court of the United States, Case No. 87-1896, entitled Jerome B. Rosenthal, Appellant vs. The State Bar of California, Appellee.

2. One of my regular duties, which I discharge in the ordinary and regular course of business, is to receive and open all incoming mail addressed to Mr. Rosenthal, stamp it with his name and the date of its receipt at the office of Mr. Rosenthal (which is where I work) at 6535 Wilshire Boulevard, Los Angeles, California.

In the mail that arrived at Mr. Rosenthal's office on July 8, 1988 was a copy of the "Motion to Dismiss or Affirm" which arrived in the mail from the State Bar

of California at 555 Franklin Street, San Francisco, California. The cover page of that document is Appendix 4, to Appellant's brief opposing Appellee's Motion to Dismiss or Affirm, to which this Affidavit will be Appendix 4-A.

3. Upon the receipt of the "Motion to Dismiss or Affirm" (booklet) I, as I always do in dealing with incoming mail, affixed by rubber stamp Mr. Rosenthal's name and the date of receipt which reads "Received July 8, 1988", the actual date of the receipt.

I clearly remember the circumstances because of the unique-ness of the situation, and because of the importance to Mr. Rosenthal. As soon as the Motion to Dismiss or Affirm came in and as soon as I stamped it (in keeping with my custom and practice), I took it in to Mr. Rosenthal and commented on the tardiness of its

arrival. I had earlier discussed with Mr. Rosenthal the fact that Appellee's time for filing such a motion had fully expired, since the completed copy of the Jurisdictional Statement was sent to the State Bar of California (Appellee) on May 17, 1988. (Appendix 3)

4. I have personal knowledge of all of the statements made above and facts contained in them, and if called upon as a witness could and would competently testify thereto. All of the statements made in this Affidavit are true and correct, to my personal knowledge.

Executed on July 13, 1988 at Los Angeles, California.

Bonnie Dantzscher
Affiant

On this 13th day of July, 1988, there appeared before me Bonnie Dantzscher, personally known to me, who signed this

Affidavit as Affiant, before me this 13th day of July 1988.

JEFFREY P. SAMUELS
Notary Public in and for
the State of California,
County of Los Angeles